United States Court of Appeals

for the Second Circuit

APPENDIX

76-2089 2094

United States Court of Appeals

For the Second Circuit

BRIAN S. FIELDING,
Petitioner-Appellant-Appellee,

v.

EUGENE LE FEVRE, Superintendent of Green Haven Correctional Facility, BENJAMIN WARD, Commissioner of the Department of Correctional Services of the State of New York, and LOUIS LEFKOWITZ, Attorney General for the State of New York,

Respondents-Appellees-Appellants.

B
Pls

JOINT APPENDIX

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FILED
OCT 8 1976
SECOND CIRCUIT

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	YR.	NUMBER	MO.	DAY	YEAR					23	$	OTHER	NUMBER	DEM.	YR.	NUMBER
8-1	76	2539	06	08	76	3	530	1					0835		76	2539

320

PLAINTIFFS

BRIAN FIELDING

Docket Entries

DEFENDANTS METZNER, J.

EUGENE LE FEVRE, Superintendent of Green Haven Correctional Facility
BENJAMIN WARD, Commissioner of the Department of Correctional Services of the State of new York
LOUIS LEFKOWITZ, ATTORNEY GENERAL OF THE STATE OF NEW YORK

1 a

CAUSE

petition for writ of habeas corpus

sls

ATTORNEYS

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[illegible]
Carl [illegible], Asst. D.A. of Westchester County
County Court House
[illegible] Grove Street, White Plains, [illegible]

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CHECK HERE IF CASE WAS FILED IN FORMA	DATE	FILING FEES PAID RECEIPT NUMBER	C D NUMBER	STATISTICAL CARDS CARD	DATE MAILED
	JUN 8 1976	7176		JS-5	X
	8 9176 742			JS-6	07/76

DATE	NR.	PROCEEDINGS
-8-76	1	**Filed petition for writ of habeas corpus. Summons issued.**
6-11-76	2	Filed petitioner's exhibits and ORDER TO SHOW CAUSE why an order should not be made granting the relief demanded in the pet. for W/H/C. Ordered that pending the determination of this motion defendants are temp, restrained as indicated, etc. Service by 6-11-76 at 5:45 PM -- OSC ret. on 6-18-76 -- Metzner, J.
6-011-76	3	Filed petitioner's affdvt. in re OSC.
06-14-76	4	Filed petitioners memorandum in support of pet. for W/H/C.
06-18-76	5	Filed reply memorandum in support of petition for W/H/C
07-16-76		Filed Opinion #46772...ct reason stated the matter is remanded to Judge Cooper for further proceeding. Should the Judge conclude that he did not [illegible] petitioner for his insistence on trial, he shall file an appropriate [illegible] to that effect. In the meantime, and pending Judge Cooper's action on the remand, the stay heretofore entered in this case is continued in force. So ordered. -- Metzner, J. m/n
07-20-76	7	Filed defts memorandum of law in opposition to petitioner's appl.
07-20-76	8	Filed defts memorandum [illegible] (State's memorandum)
7-27-76	9	Filed petitioner's [illegible] to argue court's [illegible] for dt. 7-27-76 at 10 a.m. ann'd.
7-27-76	10	Filed [illegible] in support of above.
8-9-76		Memo endorsed on motion filed 7-26-76 by petitioner for reargument in denial Application for certificate of probable cause is granted [illegible] ..... Metzner,J
08-16-76	-11-	**Filed affdvt. of Janet Cunaru in opposition to the petitioner's motion which seeks an order permitting reargumen. of the motion**
08-17-76	-12	**Filed defts notice of cross appeal to the U.S.C.A for second Circuit from order of 7-16-76 . mailed copy to Paul, Weiss, Rifkind Wharton & Garrison and Hon Louis J. Lefkowitz**
08-09-76	13	Filed Petitioners notice of appeal to the USCA from order of 7-16-76 and order of 8-9-1976. (mn)
8-31-76	14	**Filed Transcript** *of record of proceedings, dated* 6-8-76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN S. FIELDING,

Petitioner,

-against-

EUGENE LE FEVRE, Superintendent of Green Haven Correctional Facility, BENJAMIN WARD, Commissioner of the Department of Correctional Services of the State of New York, and LOUIS LEFKOWITZ, Attorney General of the State of New York,

Respondents.

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76 Civ. 2539 (C.M.M.)

Index No.

ORDER TO SHOW CAUSE WITH STAY

Upon the annexed Verified Petition For Writ of Habeas Corpus, dated June 8, 1976, and the exhibits annexed thereto, and it appearing that immediate and irreparable injury to Petitioner will result if the relief set out herein is not granted, it is hereby:

1. ORDERED that Respondents, and each of them, show cause before this Court, Honorable C.M. Metzner presiding, in Room 1103, United States Court House, Foley Square, New York, New York, on June 18, 1976, at 4:00 P.M., or as soon thereafter as counsel can be heard, why an Order should not be made and entered in this proceeding granting Petitioner the relief demanded in the Petition and why a writ of habeas corpus should not issue forthwith, pursuant to 28 U.S.C. § 2254, on the ground that Petitioner is in custody in violation of the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States, and granting Petitioner such other and further relief as this Court may deem just and proper.

BEST COPY AVAILABLE

2. ORDERED that ~~until further Order of this Court~~ pending the determination of this motion, Respondents, and each of them, and their respective officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with any one or more of them who receive actual notice of this Order to Show Cause by personal service or otherwise be and they hereby are directed to stay execution of Petitioner's sentence, imposed pursuant to judgment of County Court, Westchester County, New York, New York, signed January 2, 1975, as modified by Order of the Supreme Court of the State of New York, Appellate Division, Second Department, signed November 17, 1975 (copies of each of which are annexed hereto as Exhibit 1 and incorporated herein by reference), and to refrain from committing Petitioner to Green Haven Correctional Facility or to any other place operated by the Department of Correctional Services of the State of New York and designated by the Commissioner of Correctional Services as a place for the confinement of persons under sentence of imprisonment or persons committed for failure to pay a fine.

3. ORDERED that until further order of this Court, Petitioner be and he hereby is directed to continue in residence at Greenwich Hospital, Greenwich, Connecticut under the same terms and conditions as have existed heretofore during the pendency of Petitioner's appeal to the Court of Appeals for the State of New York, pursuant to orders of the Hon. J. Irwin Shapiro, Justice of the Supreme Court of the State of New York, Appellate Division, Second Department, signed May 28, 1976, and of the Hon. Hugh Jones, Judge of the Court of Appeals of the State of New York, signed December 2, 1975 and May 14, 1976, (copies of each of which are annexed hereto as Exhibit 2 and incorporated herein by reference).

4. ORDERED that personal service of a copy of this Order to Show Cause and the exhibits annexed hereto, together with the papers upon which it is granted, shall be sufficient if made on or before June 11, 1976 - 5:45 by hand delivery thereof to Respondent Eugene Le Fevre, and to Respondents Benjamin Ward and Louis Lefkowitz at the office of the Attorney General of the State of New York, 2 World Trade Center, New York, New York 10047.

Dated: New York, New York
June 11, 1976

Issued 5:30 p.m.

151 C.M.M.

U. S. D. J.

After notice and hearing by the Attorney General of the State of New York and the District Attorney of Westchester County.

A5

6 a

JUDGMENT APPEALED FROM.

THURSDAY, JANUARY 2, 1975

The People vs Brian S. Fielding	cts:1,5,9,13,19,25,29 Sodomy 2° 33,36,42 Sexual Abuse 2° 44 Endang.Welfar of Child 45,47,50 Sexual Abuse 2°	Indict.#74-00026-01 W.FREDRICK, ADA VINCENT LANA

171 SENTENCE

The defendant having had two days notice of sentence now on being arraigned for sentence and being asked if he had any legal cause to show why judgment should not be pronounced said defendant answered in the negative. People take no position on sentence. Defendant's attorney heard. Defendant is heard.

WHEREUPON it is ORDERED AND ADJUDGED by the Court, that the said Brian S. Fielding for the felony aforesaid, 1st ct. Sodomy 2° whereof he is convicted be sentenced to an INDETERMINATE SENTENCE of imprisonment which shall have a maximum term of SEVEN (7) YEARS:

Further ORDERED AND ADJUDGED by the Court that said defendant for the felony aforesaid 5th ct. Sodomy 2° whereof he is convicted be sentence to and INDETERMINATE sentence of imprisonment which shall have a maximum term of SEVEN(7) YEARS. SENTENCES TO RUN CONSECTIVELY.

FURTHER ORDERED AND ADJUDGED by the Court that the said defendant for the felony aforesaid cts: 9,13,19,25,29, Sodomy 2° whereof he is convicted be sentence to an INDETERMINATE sentence of imprisonment which shall have a maximum term of SEVEN (7) YEARS on each count to run concurrently with previous sentence. And it is

JUDGMENT APPEALED FROM 7 a

FURTHER CEDERED AND ADJUDGED that the said Brian S. Fielding for the offense of cts. 33,36,42 Sexual abuse 2° whereof he is convicted be imprisoned in the Westchester County Penitentiary for a definite term of ONE (1) YEAR on each count to run concurrently . And it is

FURTHER CRDERED AND ADJUDGE, that the said Brian S. Fielding for the offense Ct. 44 Endangering welfare of Child whereof he is convicted be imprisoned in the Westchester County Penitentiary for a definite term of ONE (1) YEAR, to run concurrently with previous sentence. And it is

FURTHER CRDERED AND ADJUDGED, that the said Brian S. Fielding for the offense cts: 45,47,50 Sexual Abuse 2° whereof he is convicted be imprisoned in the Westchester County Penitentiary for a definite term of one (1) Year on each ct to run concurrently with previous sentence.

Defendant advised of right to appeal the judgment of conviction, 30 days.

Stay of execution in accordance to provision 530.45 of C.P.L. and according to Order of Judge Hopkins dated 12-2-74.

A844 ORDER OF APPELLATE DIVISION. 8a

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on November 17, 1975.

HON. SAMUEL RABIN, Acting Presiding Justice,
HON. HENRY J. LATHAM
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
Associate Justices.

The People of the State of New York,

Respondent,

v.

Brian S. Fielding,

Appellant

Order on Appeal from Judgment of Conviction

In the above entitled action, the above named Brian S. Fielding, defendant in this action, having appealed to this court from a judgment of the County Court, Westchester County, rendered January 2, 1975;

and the said appeal having been argued by John Van Voorhis, Esq., of counsel for the appellant, and argued by B. Anthony Morosco, of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby modified, as a matter of discretion in the interest of justice, by changing the sentence under the fifth count of the indictment so that it shall run concurrently with the sentence imposed under the first count of the indictment rather than consecutively; and, as so modified, the judgment is unanimously affirmed, and it is further

ORDERED that the case is hereby remitted to the County Court, Westchester County, for proceedings to direct appellant to surrender himself to said court in order that execution of the judgment be commenced or resumed (CPL 460.50, subd. 5).

Enter: Irving N. Selkin

Clerk of the Appellate Division.

State of New York
Court of Appeals

BEFORE: HON. HUGH R. JONES, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

against

BRIAN FIELDING,
Appellant.

ORDER GRANTING LEAVE AND FIXING BAIL

I, HUGH R. JONES, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein questions of law are involved which ought to be reviewed by the Court of Appeals and, pursuant to CPL 460.20 it is

ORDERED that permission be, and it hereby is, granted to the above named appellant to appeal to the Court of Appeals; and notice having been given pursuant to CPL 460.60(2), it is further

ORDERED that, pursuant to CPL 466.60, execution of the judgment herein be stayed and appellant be continued on bail in the sum of $15,000, such stay and continuation of bail being subject to the following conditions which were proposed by appellant and are unopposed by respondent:

(a) Appellant commit himself to the Greenwich Hospital, Greenwich, Connecticut, for continuing care under the supervision of Dr. Michael R. Zales of Edgewood Drive, Greenwich, Connecticut; and

(b) Appellant remain in residence at said Greenwich Hospital and not leave the premises thereof; and

(c) Dr. Paul Bachner, Staff Physician at said Greenwich Hospital, inform the office of the Clerk of this Court immediately if appellant shall leave the premises of said hospital;

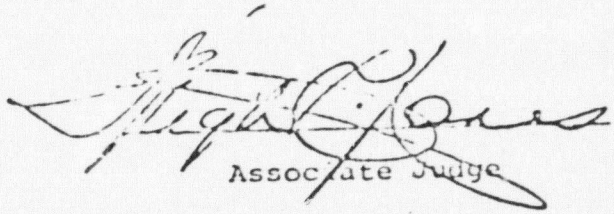
and it is further

ORDERED that the appeal be argued or submitted during the March, 1976 session of this Court, the appellant's papers on appeal

to be served on or before January 19, 1976, and the respondent's brief on or before February 20, 1976.

Dated at Utica, New York

December 2, 1975.



Associate Judge

*Description of Order: Order, Appellate Division, Second Department, rendered November 17, 1975, modifying and, as so modified, affirming a judgment of County Court, Westchester County, rendered January 2, 1975 [conviction of sodomy in the 2d degree (7 counts), sexual abuse in the 2d degree (6 counts); endangering the welfare of a child].

Notice: Within 15 days from the date hereon an appeal must be taken and this certificate must be filed with the notice of appeal. An appeal is taken by filing in the Clerk's office of the intermediate appellate court in which the order being appealed from was entered a written notice in duplicate that appellant appeals to the Court of Appeals (CPL 460.10[5] [b]) together with proof that another copy of the notice of appeal has been served upon opposing counsel (CPL 460.10[5] [c]). No stay becomes effective until the notice of appeal is served and filed (CPL 460.60[1]). This stay will terminate if the appeal has not been argued or submitted within 120 days (CPL 460.60[3])

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

BRIAN FIELDING,

Defendant-Appellant

----------x

County Court,
Westchester County
Indictment No. 24/76

ORDER TO SHOW CAUSE

Upon the annexed affirmation of JOHN P. LOMENZO, ESQ., dated the 27th day of May, 1976 and the affidavit of MICHAEL R. ZALES, sworn to the 27th day of May, 1976, and upon all the papers and proceedings heretofore had herein,

LET THE RESPONDENT SHOW CAUSE before this Court at a motion term thereof to be held at the Appellate Division Courthouse located at 45 Monroe Place, Brooklyn, New York on the 4 day of JUNE, 1976 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard,

WHY AN ORDER should not be made and entered pursuant to Section 470.15 of the Criminal Procedure Law eliminating the sentence of incarceration imposed upon the defendant, BRIAN FIELDING, herein and for such other and further relief as to the Court may seem just and proper.

SUFFICIENT CAUSE APPEARING THEREFOR, it is further ordered that pending the hearing and determination of this application, the execution of the Judgment of Conviction and sentence of incarceration of the defendant-appellant be and the same hereby are stayed upon the same conditions as contained in the Order of the Honorable Hugh Jones, Justice of the Court of Appeals, dated May 14, 1976, attached hereto.

LET SERVICE of a copy of this Order, together with a copy of the papers upon which it was granted on Carl A. Vergari, Westchester County District Attorney, 111 Grove Street, White Plains, NY 10606 on or before the 28th day of MAY, 1976 be deemed good and sufficient service.

Dated: May 28, 1976
Brooklyn, NY

S/ IRWIN SHAPIRO
ASSOCIATE Justice of the Appellate Division
of the Supreme Court, Second
Judicial Department

COURT OF APPEALS
STATE OF NEW YORK

----------x

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

BRIAN FIELDING,

Defendant-Appellant.

----------x

Upon reading and filing the annexed affirmation of IRVING ANOLIK, Esq., one of the attorneys for the defendant, BRIAN FIELDING, who is seeking a 30 day stay of incarceration pending an application to the Supreme Court of the United States for a further stay pending the filing of a petition for certiorari, and the District Attorney opposing,

NOW, on consideration of the aforesaid affirmation of IRVING ANOLIK, Esq., on behalf of defendant-appellant BRIAN FIELDING, and pursuant to 28 U.S.C. §2101,

I, HUGH R. JONES, an Associate Judge of the Court of Appeals, HEREBY GRANT to the defendant-appellant BRIAN FIELDING a 30 day stay of incarceration, so as to enable the defendant-appellant sufficient time to apply to the Supreme Court of the United States for a further stay, if that Court is so disposed to grant it, pending the filing of a petition for certiorari.

IT IS FURTHER ORDERED that the defendant-appellant continue in residence at the Greenwich Hospital, Greenwich, Conn.,

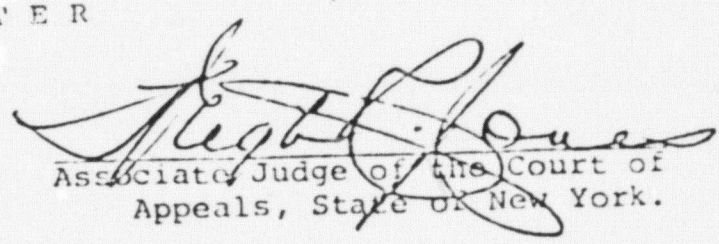
under the same terms and conditions as have existed heretofore during the pendency of his appeal to the Court of Appeals of the State of New York.

This stay expires June 14, 1976.

Dated at Utica, New York

May 14, 1976

E N T E R



Associate Judge of the Court of Appeals, State of New York.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN S. FIELDING, Petitioner, -against- EUGENE LE FEVRE, Superintendent of Green Haven Correctional Facility, BENJAMIN WARD, Commissioner of the Department of Correctional Services of the State of New York, and LOUIS LEFKOWITZ, Attorney General of the State of New York, Respondents.	Index No. PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petition of Brian S. Fielding, by his attorneys Paul, Weiss, Rifkind, Wharton & Garrison, respectfully shows:

Background:

1. Fielding is a citizen of the United States and of the State of New York. This Court has jurisdiction pursuant to 28 U.S.C. § 2254 and venue pursuant to 28 U.S.C. § 2241(d).

2. Fielding is at present confined at the Greenwich Hospital, Greenwich, Connecticut, under the terms of Orders by the Hon. Hugh Jones of the Court of Appeals of New York, and the Hon. J. Irwin Shapiro, of the Appellate Division, Second Department, staying commencement of Fielding's sentence. Upon expiration of the stay, Fielding is to begin serving a maximum of seven years. The trial court has directed that Fielding serve

his sentence at the Green Haven Correctional Facility, Stormville, New York.

3. Respondent Le Fevre is superintendent of Green Haven prison. Respondent Ward is Commissioner of the Department of Correctional Services, into whose custody Fielding is to be delivered to begin serving his sentence. Respondent Lefkowitz is named a respondent to provide full notice to the State. See Rule 2(b) of the Rules Governing Section 2254 Cases, effective August 1, 1976 (44 U.S.L.W. 4451, 4452).

4. Fielding was convicted after a non-jury trial before the Hon. John J. Clyne, County Judge, Albany County (sitting by designation), in the County Court, Westchester County, on November 21, 1974. He was found guilty of seven counts of sodomy in the second degree, under Section 130.45 of the New York Penal Law; six counts of sexual abuse in the second degree, under Section 130.60 of the New York Penal Law; and one count of endangering the welfare of a child under Section 260.10 of the New York Penal Law.

5. On January 2, 1975, Judge Clyne sentenced Fielding to seven indeterminate sentences with maximum terms of seven years imprisonment -- two of which were to run consecutively -- and to seven terms of one year on the misdemeanor counts, to run concurrently with the others. This was Fielding's first offense. He is thirty years old.

6. Fielding appealed to the Appellate Division, Second Department, which affirmed his conviction but modified the sentence only by ordering all terms of imprisonment to run

concurrently. The Court of Appeals of the State of New York affirmed that decision on May 13, 1976.

The Basis of This Petition

7. This petition is directed to Fielding's sentence which has been imposed in violation of the Sixth, Eighth and Fourteenth Amendments.

8. The Fourteenth Amendment was breached because a sentence of two consecutive maximum terms was imposed by a judge who, even before trial, deliberately closed his mind to the undisputed facts. On his first day on the case, Judge Clyne told Fielding that he would be sent to jail, whether he pleaded guilty or was convicted after trial. Judge Clyne also announced that, if Fielding chose to exercise his Sixth Amendment right to trial and thereafter was convicted, Fielding might be imprisoned for an even longer period -- regardless of what any presentence report or other evidence showed. When subsequently confronted with undisputed medical evidence, which demonstrated that Fielding suffered from a curable emotional disorder and was undergoing treatment successfully -- evidence from which the only reasonable conclusion was that Fielding should be permitted to continue to undergo medical treatment -- Judge Clyne dismissed these expert analyses as jargon. When that same medical evidence warned that there was a serious probability prison would cause Fielding to commit suicide, Judge Clyne remarked that maybe that would be for the best. Judge Clyne thus had made a predetermination to be brutually harsh.

9. Moreover, Judge Clyne presided over Fielding's trial, despite Fielding's repeated attempts to disqualify him,

even though he had had an ex parte communication with the Administrative Judge for the Judicial District which includes Westchester County. As a result of that communication, the Administrative Judge disclosed to Judge Clyne that his grandson was one of the complaining witnesses against Fielding.

10. As will be seen, the sentencing procedure here was so infected with false assumptions as to material facts, bias, and vindictiveness as to deny Fielding due process of law, in violation of the Fourteenth Amendment.

11. Equally important, the sentence itself amounts to cruel and unusual punishment. The undisputed evidence showed that Fielding's conduct resulted from an emotional disorder which can be cured. The evidence also showed -- again without contradiction -- that prison is likely not only to negate that cure but will permanently damage Fielding to the point where recidivism is the most probable result and attempted suicide is likely. Thus far, Fielding has been obtaining the treatment he needs; but every expert questioned agreed that there is no prison facility in New York where that treatment is available. Judge Clyne admitted he did not consider therapy important, however.

12. Further, the evidence before Judge Clyne showed that there is no prison in New York where Fielding can be protected from brutality and assault. It also showed that Fielding does not represent a danger to the community, and could be released on probation. Even a convict has a constitutional right to physical safety. To send Fielding to a place where he will be in constant fear and danger, when a safe alternative is available, violates the Eighth Amendment.

13. In short, Judge Clyne applied a medieval approach to a problem which all agree can be cured by twentieth century methods. The Eighth Amendment requires that a sentence be judged in the light of contemporary standards. And where it is undisputed that Fielding's sentence will make him far more disordered than when he entered prison and will irrevocably deprive him of the cure which is available -- which is this very day being administered, and administered successfully -- then modern society cannot possibly tolerate the sentence imposed here.

The Medical Evidence

14. To comprehend the fundamental unfairness of the judge's predetermination of Fielding's sentence, it is necessary to sketch the evidence the Court refused to consider. There is no dispute over the conduct involved: As a consequence of his emotional disorder, Fielding engaged in consensual homosexual acts with young adolescent boys who were members of a football team which he coached. Fielding does not seek to excuse that conduct, nor to justify it. For the past two and a half years, he has undergone medical treatment which has substantially overcome his condition. But, the sentence imposed upon him will undoubtedly cause regression.

15. The medical facts on which this petition is based are contained in the reports of six nationally known psychiatrists, who examined Fielding prior to sentencing. The doctors worked independently of each other and did not know Fielding or his family prior to his arrest. Each submitted a thorough report to Judge Clyne, copies of which are annexed as Exhibit A. Other experts,

Seymour L. Halleck and Asher R. Pacht, submitted statements on the conditions Fielding would face in prison and on the medical nature and cure of the disorder from which he suffers. (Exhibit B).* Although he declined to release the pre-sentence report, Judge Clyne has stated that there was nothing in that report which was divergent from the material contained in the psychiatrists' reports. (Judge Clyne's decision, which contains this statement is annexed as Exhibit D). The District Attorney did not contravene the reports, nor submit any contrary evidence, nor make any recommendation as to sentence. The following facts are, therefore, uncontroverted:

(a) Fielding's conduct is symptomatic of an emotional disorder called pedophilia, an attraction to adolescents or children, which may be either heterosexual or homosexual.

(b) Pedophilia is both treatable and curable; the rate of success is extremely high if the patient is treated in a normal heterosexual environment.

(c) As a result of intensive psychotherapy, Fielding no longer represents a danger to the community. He is no longer a pedophile and, if treatment continues, a complete return to normal life is likely.

(d) Prison will negate these gains and will cause permanent harm to Fielding. In the words of one examining physician, there will be a "serious probability of attempted suicide."

---

* For the background of the Court, copies of letters submitted to the sentencing judge by Fielding's girlfriend, his parents and certain other persons are annexed hereto as Exhibit C. More than sixty such letters were submitted.

(e) There is no prison facility in New York in which Fielding can receive the treatment he needs. On the contrary, experts with direct knowledge of prison conditions in New York and elsewhere believe Fielding will be harassed, beaten and in danger of being murdered.

16. Typical of the experts is Henry C. Weinstein, a psychiatrist and lawyer who is on the faculties of both the N.Y.U. Medical Center and the N.Y.U. Law School, and is Director of Forensic Psychiatry Services at the Bellevue Hospital Center. As such, he is in charge of the Psychiatric Prison Ward. He stresses his "strict view of and grave concern with those aspects of the criminal justice system which relate to the protection of the community" and his awareness of "the urgent need for society to protect itself by the incarceration of dangerous and/or violent habitual criminals." (Ex. A, A615*) Yet after examining Fielding, he concluded:

> "In my opinion, the prognosis for Brian's complete recovery is very high. Under the present circumstances, there is virtually no chance that he would be involved again in behavior dangerous to the community.
>
> * * *
>
> ". . . I am also concerned that incarceration in a jail would constitute a real and present danger to Brian's physical as well as mental well being. Having direct medical responsibility for a prison, I am very much aware of the physical dangers to a defendant such as Brian. The dangers of assaults and sexual attacks by the worst elements - the truly psychopathic criminals - are ever present.

---

* Exhibit A has been duplicated from the record on appeal to the New York Court of Appeals. For simplicity, our references are to the pages in that record.

> The effects on Brian would be devastating. Not only would any progress be halted, but the chances, under those circumstances, are good that he would regress, perhaps become fixed in a homosexual orientation, and further might very well become more depressed and suicidal. I myself have seen a number of cases such as this." (Ex. A, A616, 617) (Emphasis added)

17. Sheldon G. Gaylin, M.D., Director of Psychiatry at Grasslands Hospital, Valhalla, New York, reached the same conclusion. He stated that for Fielding to be incarcerated for any period of time:

> ". . . would be a true tragedy in many ways. One, is that treatment which apparently has been quite successful, would be interrupted and probably totally negated. In addition, I know of no prison facility which can offer the kind of therapy that Mr. Fielding needs.
>
> Secondly, it would interrupt his ability to develop a normal social and sexual and family relationship which is absolutely essential to the well being of this young man.
>
> Thirdly, the kind of behavior which brought this man to court would make any jail sentence extremely dangerous to him physically. I know of no jail or penitentiary in which he could be protected from abuse from fellow prisoners unless he were kept in solitary confinement. In discussion with local corrections officials, they indicate that even solitary confinement, must be broken periodically and the chances of his being seriously hurt are great. Even if some way could be found to protect him, the constant anxiety related to the fear of personal attack would be a constantly present and overwhelming burden. These anxieties plus long periods of isolation could lead to serious depressions, and the potential for self destructive behavior." (Ex. A, A534) (Emphasis added)

Dr. Gaylin is the person to whom the Westchester County courts most often refer persons for psychiatric examination.

18. Fielding was examined also by Dr. Robert L. Sadoff, Professor of Psychiatry at the University of Pennsylvania School of Medicine and one of the country's leading forensic

psychiatrists and experts on the penal aspects of sexual offenses. He concluded that to take Fielding

> "out of his current situation and to place him in prison would be disastrous for several reasons:
>
> 1. Brian needs the treatment he is getting if he is to continue to be productive and to contribute to society and not regress to his former level of activity.
>
> 2. Incarceration would undoubtedly cause such a regression in him and would undo much of the good that has occurred over the past fourteen months for him.
>
> 3. The real danger for a person convicted of this type of behavior in our prison system is evident to all who know anything about prisons. These men are harassed, beaten and literally destroyed unless very special isolation methods are used to protect them from other inmates." (Ex. A, A577) (Emphasis added)

19. These reports remain accurate today. Dr. Michael R. Zales, Fielding's treating psychiatrist, reports that as of now Fielding's "Pedophilic impulses have been supplanted by a genuine desire to join heterosexual society. He is no longer a Pedophile. He poses absolutely no threat to society." (Exhibit E).

20. In these circumstances, the sentence imposed upon Fielding is not merely seven years, excessive as that would be -- it is literally a life sentence of unnecessary and preventable illness, and, as the experts recognized, possibly even a death sentence. Hence, even assuming Fielding presented his case to a judge with an open mind, Fielding's sentence is cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments.

The Sentencing Process

21. Judge Clyne rejected all of this medical evidence as "jargon" and sentenced Fielding to a maximum of fourteen years. The record makes it clear that he had decided in advance of any trial that medical evidence would be irrelevant. Indeed, the record indicates that the sentencing denied Fielding the fundamental fairness to which the Fourteenth Amendment entitles him:

(a) On the very first day he was assigned to the case, Judge Clyne announced that even if Fielding pleaded guilty, he would be imprisoned. Judge Clyne reached this conclusion before he knew anything of Fielding's background, before he heard any evidence, before any psychiatric reports had been submitted, and before the presentence report required by New York law was even dreamed of. Thus, Fielding's sentence -- imprisonment -- was decided from the outset. Fielding never had a meaningful opportunity even to ask for probation.*

(b) Judge Clyne was assigned to this case pursuant to the request of the Hon. Joseph F. Gagliardi, Administrative Judge of the New York Supreme Court for the Judicial District which included Westchester County. Judge Clyne had an ex parte communication with Judge Gagliardi, as a result of which Judge Clyne learned that the grandson of Judge Gagliardi was a complaining witness. This fact was unknown to Fielding's counsel because the witness' surname was not Gagliardi. And

---

* These facts were set forth in an affidavit by Fielding's first counsel in an action to disqualify Judge Clyne, a copy of which is annexed as Exhibit F.

it could -- and certainly should -- have remained unknown to Judge Clyne. But, after Fielding's counsel had asked Judge Clyne why he had been assigned to the case, Judge Gagliardi wrote Fielding's counsel that "after consulting with Judge Clyne" he had decided to disclose his family's involvement. (Exhibit G). This ex parte conversation may well have contributed to the barbaric sentence Judge Clyne handed down. Whether the two had other ex parte communications regarding this matter is unknown.*

Judge Gagliardi's grandson testified for the People at Fielding's trial. The witness' mother and father -- Judge Gagliardi's daughter and son-in-law -- also testified.

(c) The Court's disregard of the most basic elements of fair sentencing were revealed by Judge Clyne's statements to Anne Vitale, Fielding's girlfriend. Ms. Vitale had written an extraordinarily moving letter to the Court, pleading for leniency (Exhibit C), and Judge Clyne asked to meet with her. Among other things, he told her that he considered the psychiatrists' reports to be jargon; that the world would be better off if the criminal were condemned along with the crime; that probation would mean he was condoning the crime; that he did not know if therapy was available in prison and in any event he did

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* Fielding's counsel duly moved for recusal. (Ex. F). Judge Clyne refused. Fielding then commenced a proceeding, pursuant to Article 78 of New York's Civil Practice Law and Rules, to have Judge Clyne disqualified and the case heard by a Westchester County judge in the normal course. This too was rejected by the Appellate Division. In opposition to Fielding's proceeding, the People submitted an affidavit by Judge Clyne (Ex. I).

not think it was important. But most shocking of all, when Ms. Vitale said "I saw the horror and pain that Brian was suffering and I knew suicide was a possibility," Judge Clyne dismissed Fielding's suicide as maybe for the best. (Ms. Vitale's affidavit is annexed hereto as Exhibit H.)

22. Judge Clyne made no statement at sentencing to explain his imposing a maximum term of fourteen years on Fielding, a first offender. He did not even respond to the compelling medical evidence submitted, supposedly, to ensure that he reach a fair and rational sentence. Nor could he -- for the facts set forth above demonstrate that his sentence was not arrived at fairly, but was foreordained by his refusal to hear and consider any view but the one he formed before hearing any evidence. At the very least, a hearing must be held to determine whether the sentencing process met the constitutional requirements of fundamental fairness.

Violation of Fielding's Sixth Amendment Rights

23. One statement by Judge Clyne requires special mention. At his initial conference with counsel on October 15, 1974, Judge Clyne sought to initiate plea bargaining. In order to induce Fielding to plead guilty, he told counsel that, if Fielding went to trial and was convicted, his prison sentence might be even more severe than the prison sentence Judge Clyne would impose if Fielding pleaded guilty. (Exhibit F, ¶ 8)

24. Such threats violate a defendant's rights under the Sixth Amendment to demand a trial, since they deter persons

from seeking a trial for fear of vindictive punishment if they are found guilty.

25. The Courts consistently have held that the Sixth Amendment prohibits a trial judge from making increased imprisonment the cost of exercising one's right to a trial. Yet this was precisely the choice Fielding faced -- and precisely the cost he ultimately was told to pay.

Exhaustion of State Remedies

26. Fielding has exhausted state remedies as required by 28 U.S.C. § 2254. All of the issues and facts set forth above have been fully presented to the courts of New York. The exhibits annexed hereto were filed with the sentencing court, and the constitutionality of his sentence and the bias of the sentencing judge were briefed to the New York Court of Appeals, on direct review of Fielding's conviction.

27. No prior application to any court for a writ of habeas corpus has been made. Fielding has applied to the Supreme Court of the United States for a stay pending a petition for certiorari, which has been denied by Justice Thurgood Marshall. He has applied to the Appellate Division, Second Department for a reduction of his sentence. In connection with that proceeding, the Hon. Justice J. Irwin Shapiro has signed an order staying execution of Fielding's sentence during the pendency of his application.

28. Petitioner respectfully requests that this petition be brought on by order to Show Cause, with a temporary restraining order. The present stays granted by Judge Jones and Justice Shapiro will expire as soon as the Appellate Division rules on Fielding's pending application, and once the damage of prison begins, it will be difficult to reverse.

WHEREFORE, petitioner prays:

1. That a writ of habeas corpus be directed to the respondents, issued on the petitioner's behalf so that petitioner may be brought before this Court.

2. That respondents be required to appear forthwith and respond to the allegations made herein.

3. That after a full and complete hearing, this Court relieve petitioner of the unconstitutional sentence imposed upon him and direct that he be resentenced to a term of probation upon the condition that he continue in intensive psychotherapy and medical care.

4. That respondents be ordered to stay the execution of Fielding's sentence and to refrain from committing petitioner to prison pending final determination of this petition.

5. That the Court grant such other and further relief as the Court may deem just and proper.

Dated: New York, New York
June 7 , 1976

PAUL, WEISS, RIFKIND, WHARTON & GARRISON

By _____
Jay Topkis
Attorneys for Brian S. Fielding
345 Park Avenue
New York, New York 10022
(212) 644-8000

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JACK C. AUSPITZ, being sworn, states:

1. I am associated with the firm of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for Petitioner Brian S. Fielding in this proceeding. I have read the annexed Petition For Writ of Habeas Corpus and know the contents thereof. On information and belief, the Petition is true. The basis for my belief is documentary evidence, copies of which are annexed as Exhibits to the Petition.

Jack C. Auspitz

Sworn to before me this
8th day of June, 1976

Notary Public

JAY HEMES
Notary Public, State of New York
No. 31-4525415
Qualified in New York County
Commission Expires March 30, 1978

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Decision and Order of Honorable Charles M. Metzner, Signed July 16, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

BRIAN S. FIELDING, :

Petitioner, :

-against- : 76 Civ. 2539 (CMM)

EUGENE LE FEVRE, Superintendent of Green Haven Correctional Facility, et al., :

Respondents. :

- x

METZNER, D. J.:

Petitioner Brian S. Fielding moves by order to show cause for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Fielding was indicted in the County Court of Westchester County, New York, on March 15, 1974, on 52 counts of various degrees of improper sexual conduct involving eleven to thirteen year old members of a "Pop Warner" football team of which petitioner was the coach.

On October 15, 1974, the parties appeared in the County Court of Westchester County on the state's motion for a trial preference. The parties were informed that County Judge John J. Clyne of Albany County would preside over the trial. Judge Clyne took the bench and set a scheduled date for trial of October 28, 1974. Petitioner's then counsel protested this date in that it conflicted both with a prior scheduled criminal action in the United States District

Court, Southern District, and with his long prior scheduled military service. According to counsel, the judge "curtly and rudely" told him that the court would not honor either commitment, and that the trial would proceed as scheduled. Judge Clyne states he was not rude or abusive, but simply stated that the trial date was firm in that it best suited his trial schedule in Albany.

Petitioner's counsel, the Assistant District Attorney and the court then retired to the robing room where counsel inquired as to the reason for Judge Clyne's appointment to sit in Westchester. Both the judge and the Assistant District Attorney responded that they had no idea.

Judge Clyne then inquired whether there had been any plea negotiations in the action and when informed by the Assistant that he would have to consult his superiors, the judge called the District Attorney and stated that the court would appreciate the communication of the state's position to petitioner's counsel as quickly as possible. According to the latter, the court then informed him that even if a plea were to be arranged, the defendant would be incarcerated, and if the plea was rejected and the defendant was to stand trial "and be found guilty, that the sentence might be more severe."

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Judge Clyne's affidavit states that he told counsel "that it was the present intention of the Court to incarcerate the defendant in the event that he should enter a plea of guilty to one or more of the felony charges and that this Court would not entertain any motion to reduce below one or more felony charges." There is no mention in the judge's affidavit of any reference to a heavier sentence if the defendant stood trial.

On October 18, 1974, counsel received a letter from the Administrative Judge of the Ninth Judicial District, with a copy to Judge Clyne, stating that Judge Clyne had been assigned following a request by Judge Joseph Gagliardi of the Ninth District whose grandson was a complaining witness in the case. The letter stated that Judge Gagliardi had consulted with Judge Clyne, but whether Judge Clyne knew the reason for his appointment at the time he spoke to counsel on October 15 is not made clear. Judge Clyne's affidavit states that he first knew the reason when he received his copy of the letter. As the grandson bore a different surname from Judge Gagliardi, Judge Clyne never knew which witness was the grandson.

On October 22, 1974, counsel met with Judge Gagliardi who refused to become involved in the case or in the possible disqualification of Judge Clyne. Judge

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Clyne refused to disqualify himself. The petitioner then instituted an Article 78 proceeding in the Appellate Division, Second Department, to disqualify Judge Clyne. The application was denied and an immediate trial ordered.

Trial to the court without a jury commenced on November 19, 1974, and on November 21, 1974, the court found petitioner guilty of seven felony counts and seven misdemeanor counts. There was no evidence that the petitioner had used any force or duress in his relationships with the young boys.

Prior to sentence Fielding was examined by six eminent psychiatrists who found that he suffered from a treatable and curable emotional disorder called "pedophilia." Theyall recommended against incarceration because, in their opinion, petitioner posed no threat to society, and that incarceration, especially without ongoing intensive treatment of his disorder, would cause retrogression of his condition, recidivism, and perhaps suicide. The doctors also pointed out that homosexual offenders were the subject of great abuse in prisons, and that this would contribute to the "destruction" of Fielding.

Many letters were sent to Judge Clyne, one of which was from Anne Vitale, Fielding's girlfriend. She met with Judge Clyne in Albany on December 30, 1974, for

an "off the record" conversation. According to her affidavit, uncontroverted by an affidavit from Judge Clyne, Judge Clyne said he had "read the reports [of the psychiatrists] and that he had gone over all of the jargon that the psychiatrists had used." He intimated that he did not approve of psychiatrists' reports, preferring to "condemn the criminal along with the act." The judge, according to the affidavit, also stated that if he didn't send the petitioner to jail, it would be impossible to deal with those who could not afford all the psychiatric evaluations and legal fees.

He is further alleged to have stated that a sentence of probation would mean that he condoned the crime, that he didn't think that therapy was important to the petitioner, and that he didn't know if therapy was available in prison. He noted that community reaction would be adverse if the petitioner were not incarcerated. Finally, the affidavit states that, in discussing the risk of suicide to the petitioner, Judge Clyne said that "maybe it would be for the best.".

On January 2, 1975, Judge Clyne sentenced the petitioner to terms of seven years to run consecutively on two of the felony counts, and twelve other concurrent terms. On November 11, 1975, the Appellate Division affirmed the conviction but directed that the felony

sentences run concurrently, rather than consecutively. Judge Jones of the New York Court of Appeals extended the stay of execution of sentence pending appeal to the Court of Appeals on condition that petitioner commit himself to Greenwich Hospital, Greenwich, Connecticut, and to remain on those premises. The Court of Appeals affirmed the judgment of conviction on May 13, 1976, granting another thirty-day stay for the filing of an application for certiorari to the United States Supreme Court. As that date approached, petitioner applied to Mr. Justice Marshall for a stay pending appeal, which was denied. The petitioner then filed a motion to reduce sentence before the Appellate Division, Second Department, which granted a stay pending its decision, subject to the conditions imposed by Judge Jones. Petitioner also filed the instant application for a writ of habeas corpus on June 11, 1976. Subsequent to argument on this application, the Appellate Division denied the motion for reduction of sentence.

Petitioner asserts that he was sentenced in violation of his Sixth, Eighth and Fourteenth Amendment rights in that his sentence was unfair in terms of his psychiatric reports, constituted cruel and unusual punishment, and is impermissible because the judge had predetermined a jail sentence without reference to a pre-sentence

report. In addition, he claims that his right to a free and fair trial was chilled by the judge's alleged threat of a heavier sentence were he to stand trial.

I should state at the outset that although habeas corpus review is generally available only after the incarceration of the petitioner and the beginning of service of his sentence, in this case I find sufficient detention of the person in the stay order requiring commitment to a mental hospital, and physical limitation to its premises, to allow a habeas petition to be heard by the court.

Of course, severity of sentence, in itself, is not amenable to review by writ of habeas corpus since the sentence imposed does not exceed the maximum under the statute for the crime in question. Townsend v. Burke, 334 U.S. 736 (1948). Petitioner does not claim that a seven year sentence is cruel and unusual for the crime of sodomy in the second degree (N.Y. Penal Law § 130.45 (McKinney 1975)).

The argument under the Eighth Amendment is that incarceration of a pedophile who is capable of cure, in an environment which is particularly hostile to homosexual offenders, constitutes cruel and unusual punishment. It is possible that a habeas writ could issue if it is shown that prison conditions in the entire state are such that

incarcerating Fielding could constitute cruel and unusual punishment. See, e.g., James v. Wallace, 382 F. Supp. 1177 (M.D. Ala. 1974). However, there are no such proofs before the court in this petition, and the court may not speculate as to the efficacy of the state's control of its penal system.

Petitioner claims violation of his due process rights under the Fourteenth Amendment on two grounds: (1) that the judge was predisposed to give petitioner a jail sentence without knowledge of the relevant factual circumstances of the petitioner's condition, and that, therefore, the court denied petitioner's "right to be heard"; (2) that the judge's knowledge of the existence of Judge Gagliardi's grandson as a complaining witness prejudiced Judge Clyne.

As to the first ground, the facts do not sufficiently substantiate the claim. Judge Clyne's affidavit says that he told counsel that his "present intention" was to incarcerate the petitioner even in the case of a plea to a felony. He said that he would not entertain a plea below felony level. It is entirely consistent with New York practice in connection with plea bargaining to inform counsel of the judge's views regarding sentence. United States ex rel. Selikoff v. Commissioner of Correction, 524 F.2d 650 (2d Cir. 1975).

As the court pointed out in Selikoff, a judge may not, under New York law, reach an irrevocable decision prior to the receipt of a presentence report. Id. at 653. As shown even by the Vitale affidavit, the court read the reports of the psychiatrists, and there is every indication that he read the presentence report. Even if he did not, there is no indication, and petitioner cites no authority to suggest, that there is a constitutional imperative that requires certain presentence procedures, such as the examination of presentence reports. E.g., United States v. Heng Awkak Roman, 484 F.2d 1271 (2d Cir. 1973), cert. denied, 415 U.S. 978 (1974); United States v. Warren, 453 F.2d 738 (2d Cir.), cert. denied, 406 U.S. 944 (1972).

Finally, there is no showing that Judge Clyne had any bias, other than the possible inference that he took a dim view of the crimes with which petitioner was charged. A judge's view of the severity of the offense is as much a part of sentencing consideration as individual circumstances of the defendant. Each element is a factor in a judge's mind, and it does not reach the level of constitutional deprivation justifying habeas corpus that the judge, in the exercise of his discretion, strikes a different balance than petitioner would like.

As to the second Fourteenth Amendment argument, there is no showing that the knowledge by Judge Clyne

that a colleague's grandson was a complaining witness, without knowledge of which witness it was, and without prior acquaintance with the judge, prejudiced the petitioner. It would be unrealistic to assume that any judge assigned to try this matter would not learn of the fact sometime during the course of carrying out the assignment. There is certainly no showing of a denial of due process of constitutional dimension on the facts here.

Finally, the court turns to the more difficult claim under the Sixth Amendment. Counsel's affidavit is explicit that Judge Clyne stated there might be a heavier sentence if petitioner stood trial. While a judge may permissibly sentence a defendant to a lesser sentence than otherwise if he pleads guilty, on a showing that he has started on the road to rehabilitation, United States v. Floyd, 496 F.2d 982, 989 (2d Cir. 1974), he may not sentence a defendant to a more severe sentence simply because he exercises his constitutional right to stand trial. United States v. Derrick, 519 F.2d 1 (6th Cir. 1975); Hess v. United States, 496 F.2d 936 (8th Cir. 1974); United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948 (1973). It is the potential for vindictiveness, not its actual existence, that raises the issue. Cf. Blackledge v. Perry, 417 U.S. 21 (1974).

As the court said in Hess, supra:

> "[S]ince the tenor of the court's observation is not entirely clear, and because the remedy is relatively painless, we believe the trial judge should be afforded an opportunity to fully examine his sentencing procedure and to consider the factors which motivated the sentences imposed." Hess v. United States, supra at 938.

Counsel's affidavit referred to above raises a necessary inference that the severity of the sentence could have been based in part on the fact that petitioner stood trial. Judge Clyne omitted any reference to such a statement in his affidavit. Under the facts here, there is enough to infer that such an improper basis for sentence may have existed. Accordingly, the court will grant petitioner's motion on the above stated ground only, and will remand the matter to Judge Clyne for further proceedings. If, after an objective evaluation, the judge should find that his sentence was motivated by such an improper consideration, he shall set the sentence aside and resentence petitioner. Should he conclude that he did not penalize petitioner for his insistence on trial, he shall file an appropriate order to that effect.

In the meantime, and pending Judge Clyne's action on the remand, the stay heretofore entered by this court shall continue in force.

So ordered.

Dated: New York, N. Y.
July 16, 1976

U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BRIAN S. FIELDING, :

Petitioner, : 76 Civ. 2539 (C.M.M.)

-against- :

EUGENE LE FEVRE, et al., :

Respondents : NOTICE OF MOTION

----------x

S I R S :

PLEASE TAKE NOTICE that upon all prior papers and proceedings herein, the undersigned will move this Court, Room 2201, United States Court House, Foley Square, New York, New York, on August 9, 1976, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order:

(a) Pursuant to Rule 9(m) of the General Rules of this Court, granting leave to reargue the form of relief appropriate in light of this Court's decision and order, filed July 16, 1976, and pursuant to 28 U.S.C. § 2243, vacating Petitioner's sentence and directing that this matter be remanded to the Westchester County Court for resentencing; and, alternatively,

(b) Pursuant to Rule 22(a), Fed. R. App. P., if the relief requested in (a) is denied, directing issuance of a certificate of probable cause to appeal; and

(c) Directing such other and further relief as this Court may deem just and proper.

Dated: New York, New York
July 26, 1976

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
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(212) 644-8000

Attorneys for Petitioner

By _____
Jack C. Auspitz

TO:

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Attention: B. Anthony Morosco

District Attorney of
Westchester County

76 Civ. 2539 (CMM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIAN S. FIELDING,

Petitioner,

-against-

EUGENE LE FEVRE, et al.,

Respondents.

NOTICE OF MOTION

Paul, Weiss, Rifkind, Wharton & Garrison

Attorneys for Petitioner

345 Park Avenue, New York, N. Y. 10022
644-8000

All communications should be referred
to Jay Himes, Esq.

August 6, 1976 This motion
for reargument is denied. Application for
Certificate of probable cause is granted.

So ordered

Charles H. Metzner
USDJ

26 1976

Louis J. Lefkowitz
Atty. Gen.



44a

REPORT OF MICHAEL R. ZALES, M. D.

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A520

MICHAEL R. ZALES, M.D., P.C.
EDGEWOOD DRIVE
GREENWICH, CONNECTICUT 06830

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46 a

December 14, 1974

PERSONAL AND CONFIDENTIAL

Re: Brian Fielding
Indictment No. 26/74

Mr. Brian Fielding is a twenty-nine-year-old white male who has been involved in intensive psychotherapy with me on a three times per week basis since October, 1973. He has recently been convicted of having committed, prior to our treatment, a number of acts of mutual masturbation and fellatio, within a group setting with eleven- and twelve-year-old boys on a football team of which he was the coach.

Mr. Fielding grew up in a home with a father whom he described as aggressive, competitive, assertive, and successful, and as always having favored the patient's older brother. The mother was characterized as having been constantly caught between her loyalties toward her husband and the patient, frequently absent during the patient's childhood, and ever-unsure of an appropriate motherly stance toward him. The thirty-two-year-old older brother was seen as distant, unaccepting of the patient, and though still quite young, already extremely successful both as a young physician, and in his multiple avocations as well.

The patient's early childhood, during which time the patient was primarily raised by a nurse, could be seen as one creating a shy, depressed youngster, who felt weak, powerless, and unappreciated. His loneliness, underachievement, and need for a security blanket at age ten prompted his parents to seek psychiatric attention for Mr. Fielding, and he thus saw the first of four psychiatrists, for very short and unsatisfactory periods. He continued to cry at night, continued to suffer

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from what he perceived as ongoing favoritism directed at his brother, and, most important, at age eleven, experienced a trauma which played a crucial role in creating his future problem: while engaged in a game of football, a number of older boys threatened to strip the patient of his clothes and to abuse him sexually. From that time on, his sensitivity and shyness only increased. In addition, his sexual development was slow, and even after development was completed, he felt his penis to be of a markedly inadequate size, a feeling which the patient accepted as further proof of his unworthy and less-than-acceptable status.

Mr. Fielding's high school record was not exceptional, and when he went off to Lafayette College, his immaturity led him to return to his home every weekend, unmotivated, to "hang around", sleep late, and "be taken care of". He lasted at Lafayette only a few weeks into his sophomore year, came home, and after more directionless activity, worked for First National City Bank as a teller for one year. It was then that he achieved his first success as coach of Midget Football, at which he was actively employed from 1966-1973. It became a full-time occupation in that, beside being coach and having his team win the National Championship in 1970 and 1971, he also became President of Midget League and then Commissioner of Westchester County. He not only became a hero to the boys he coached, but he was also accepted into many of their homes. He actively participated in the other families to make up for the remoteness he experienced in his own home.

The patient's sexual maladptation was directly related to the historical data above, and also to the presence of a governess in the home for many years who, unknowing of the possible psychological sequellae, repeatedly jokingly threatened to castrate the patient. The maladptation, however, was primarily precipitated by the patient's own repeated knee injuries and the

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resultant operations two years ago, at which time he had to give up the idea of ever being an athletic hero in his or anyone else's eyes, and at which time he made the move in his own thoughts from figurative to literal cripple. He felt he had nothing more to achieve in Midget Football. His depression then facilitated his disturbed sexual role.

Mr. Fielding's psychological state, then, at the time of the incidents in 1972, was that of a very depressed man. Because of the history and a consideration of the impulses inherent in the charges made against him, the diagnosis of Pedophilia is most appropriate. Definition: "The pedophile requires the cooperation of a child partner of the same or opposite sex in order to achieve sexual gratification."* The pedophile avoids coitus with an adult love object because of his overwhelming anxiety; instead, he is attracted to children who do not elicit the same anxiety. The pedophile identifies with his frustrating mother and behaves as he had previously wished his mother to behave toward him. It is my definite belief that the patient's behavior was produced by his mental disorder, and involved in this disorder is a loss of impulse control on the part of the patient.

It is quite clear that, in this case, there was a marked loss of judgment on the part of the patient, and I will address myself to this issue later in discussing the therapy. Suffice it to say at this point that the patient, through repeated episodes, was obviously attempting to "get caught", to seek punishment by an authoritative adult. Suffering from extreme guilt, he was crying out for the psychiatric help which he had previously not been able to use constructively.

* Freedman & Kaplan, Comprehensive Textbook of Psychiatry.

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It was thus that we began a psychoanalytic psychotherapy, by which I mean a therapy which considers: the complex interplay between inborn maturational phases and the environment of childhood; present quantitative and qualitative influences; as well as a knowledge of the patient's state, at each period of his life, as a biological organism in constant interaction with his cultural, interpersonal, and physical environment.

In contradistinction to Mr. Fielding's experience with three other psychiatrists in the past, a therapeutic alliance, the necessary ingredient to a successful therapy, was rapidly reached. The reason for this was not the skill of the present therapist, but rather the extreme degree of motivation for help demonstrated by the patient.

Therapy thus far has resulted in much insight into the nature of the patient's personality and previous behavior. He has examined the motivation behind searching out families other than his own and has, as a result, developed a closer relationship with each of his family's members. For example, he has become accepting of women in general, but of his mother in particular, and has, in addition, been able to maintain a relationship with a young woman his age and also to make appropriate heterosexual overtures. Heterosexuality has become markedly less conflicted for him. He has also been able to deal with his older brother on a friendly, warm level, and he has developed a mutually respectful attitude with his father, which has allowed them to work actively together on sophisticated business projects. The patient's chronic fear of rejection and of being hurt by others, but particularly by his family, has all but disappeared.

During therapy the patient has enrolled at the College of New Rochelle where he has consistently done excellent work and where he is an active candidate for the degree of Bachelor of Arts. He has also taken

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a complete battery of intelligence and aptitude tests, the very superior results of which are attached.

As regards the patient's sexual maladaptation it became quite clear that it was really the viewing alone of what he considered normal genitalia in which he was interested. Through this viewing, he felt that he and his body too, were somehow normal. Since therapy, all thoughts and dreams related to such behavior have become colored by the emotion of repugnance. It also has become evident that the patient suffered from exceedingly poor judgment during any behavior considered pedophilic. This fact was substantiated quite clearly by the projective psychological testing performed by Dr. Leopold Bellak, who stated that all of the patient's sexuality involved defects of reality testing, judgment, and impulse control. Furthermore, in his sexual impulses toward younger boys, the patient felt an inability to control them even though he anticipated that it would lead to his exposure.

At present, Mr. Fielding is operating at a markedly better adjusted level, is demonstrating excellent motivation and potential for development, and with continued therapy, he has the underlying strengths to contribute a great deal to society. Because of his very strict conscience, he poses absolutely no threat to the community at this time, and if his present mode of therapy is allowed to continue, he should readily attain a normal sexual life and pose no real danger of ever performing such an act.

Incarceration at this time would only serve to retard the patient's psychiatric advances, but in this case, even intensive therapy within prison would be fruitless. I have witnessed Mr. Fielding's severe depression during his recent incarceration, its temporarily negative effect upon our therapy, the development of a marked suicidal potential, about which I immediately informed

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the prison physician, who concurred with my opinion. Of course, I am primarily concerned with the patient's suicidal potential, but I must also consider the other, very real danger involved in a penitentiary situation.

It is thus my very strong opinion that the interests of society would best be served by a probationary sentence.

Michael R. Zales, M.D.

CONFIDENTIAL: FOR THE USE OF PROFESSIONAL PERSONNEL ONLY. NOT TO BE PLACED AT THE DISPOSAL OF ANY OTHER PERSON.

CURRICULUM VITAE: Michael R. Zales

Date of Birth: April 26, 1937.
Wife : Ruth Elayn Aron.
Date of Marriage: July 30, 1959.
Children: Melissa Merle (March 4, 1963).
Samuel (March 7, 1965).

I. Princeton University, A.B. 1955 - 1959.
Major Departments: Religion and European Literature.
Senior Thesis: Dostoyevsky: The Search for God and Ethical Perfection.

Summer Employment:

1955 Student, University of Grenoble, Grenoble, France.
1956 Orderly, Greenwich Hospital, Greenwich, Connecticut.
1957 Research Assistant, Anticonvulsant properties of drugs, with J. Gordon Millichap, Associate Professor of Pediatrics and Neurology, Albert Einstein College of Medicine (AECOM).
1958 Research Assistant, Nitrogen retention with androgenic compounds, with William Metcalf, Professor of Surgery (AECOM).

II. Albert Einstein College of Medicine, M. D. 1959 - 1964.
Class President 1,2,3,4.
Student Council 1,2, President 3,4.
Summer Employment:

1959 Pathology Assistant, Greenwich Hospital.
1960 Student, Graduate School of Psychology, Columbia University.
1961 Research Assistant, Electro-convulsive shock and retrograde amnesia, with Murray E. Jarvik, Associate Professor of Pharmacology, (AECOM), National Science Foundation Fellowship.

Publication: Millichap, J.G., Hernandez, P., Zalen, M.R., "Studies in febrile seizures", NEUROLOGY, June, 1960.

Elective: 1963 Clinical Pediatric Neurology. Effects of ACTH on acid-base and electrolyte balance, with J. Gordon Millichap, Professor of Neurology and Pediatrics, Northwestern University Medical School, Mayo Foundation and National Institutes of Health Fellowships.

III. Greenwich Hospital 1964 - 1965.
Intern.
National Board of Medical Examiners, July 1, 1965.

IV. United States Navy 1965 - 1967.
Squadron Medical Officer, COMPHIBRON FOUR.
Publication: First Aid Handbook., Department of the Navy.

V. Cincinnati General Hospital 1967 - 1970.
Junior Resident in Psychiatry.
Senior Resident in Psychiatry.
Chief Resident in Psychiatry, Inpatient Service.
Curriculum Committee.
Medical Student Teaching Committee.
Residents' Council.
Co-Chairman, Wednesday Afternoon Seminar.
Fellow, Group for the Advancement of Psychiatry (Psychiatry and Religion).

Teaching:

1968 - 1970 University of Cincinnati College of Medicine, "Principles of Psychiatric Treatment", role-playing techniques for medical students.

1969 Hebrew Union College - Jewish Institute of Religion, pastoral counseling for rabbinical students.

Elective: 1969 Community Mental Health, with Stanley L. Block, Associate Clinical Professor of Psychiatry, University of Cincinnati College of Medicine.

Greenwich, Connecticut 1970-.
Private Practice, 1970-.
Greenwich Hospital - Attending Psychiatrist, 1970 -.
Greenwich Hospital - Clinic Psychiatrist, 1970 - 1972.
Consultant: A. Greenwich Center for Child and Family Service, 1970 - 1972.
B. Presbyterian Church, Greenwich, 1971 -.
C. Intensive Care Unit, Greenwich Hospital, 1970-.
D. J. Walter Thompson, New York, 1970 -.
E. Greenwich Department of Health, 1973 -.
F. Nathaniel Witherell Home, 1973 -.
G. THE HEART DOCTOR'S HEART BOOK, Grosset & Dunlap, New York, 1974.

Board of Directors:
A. Community Centers Inc., Drug Liberation Program, 1972-.
B. Nursing, Rehabilitation & Residence Home, Stamford, Connecticut, 1971 -.
C. Greenwich Hot Line, 1971 -.
D. Franklin S. DuBois Day Treatment Center, 1972-.
E. Temple Sholom, Greenwich, 1973 -.
F. Jewish Home for the Elderly, Fairfield, Connecticut, 1974 -.

Chairman: A. Israel Bonds, Greenwich, 1972-.
B. Professional Division, United Jewish Appeal, 1971 -.

Faculty: A. Albert Einstein College of Medicine, Instructor, 1970 - 1974, Assistant Professor, 1974 -.
B. Hebrew Union College, Visiting Lecturer, 1974 -.

Licensure: Connecticut and New York.

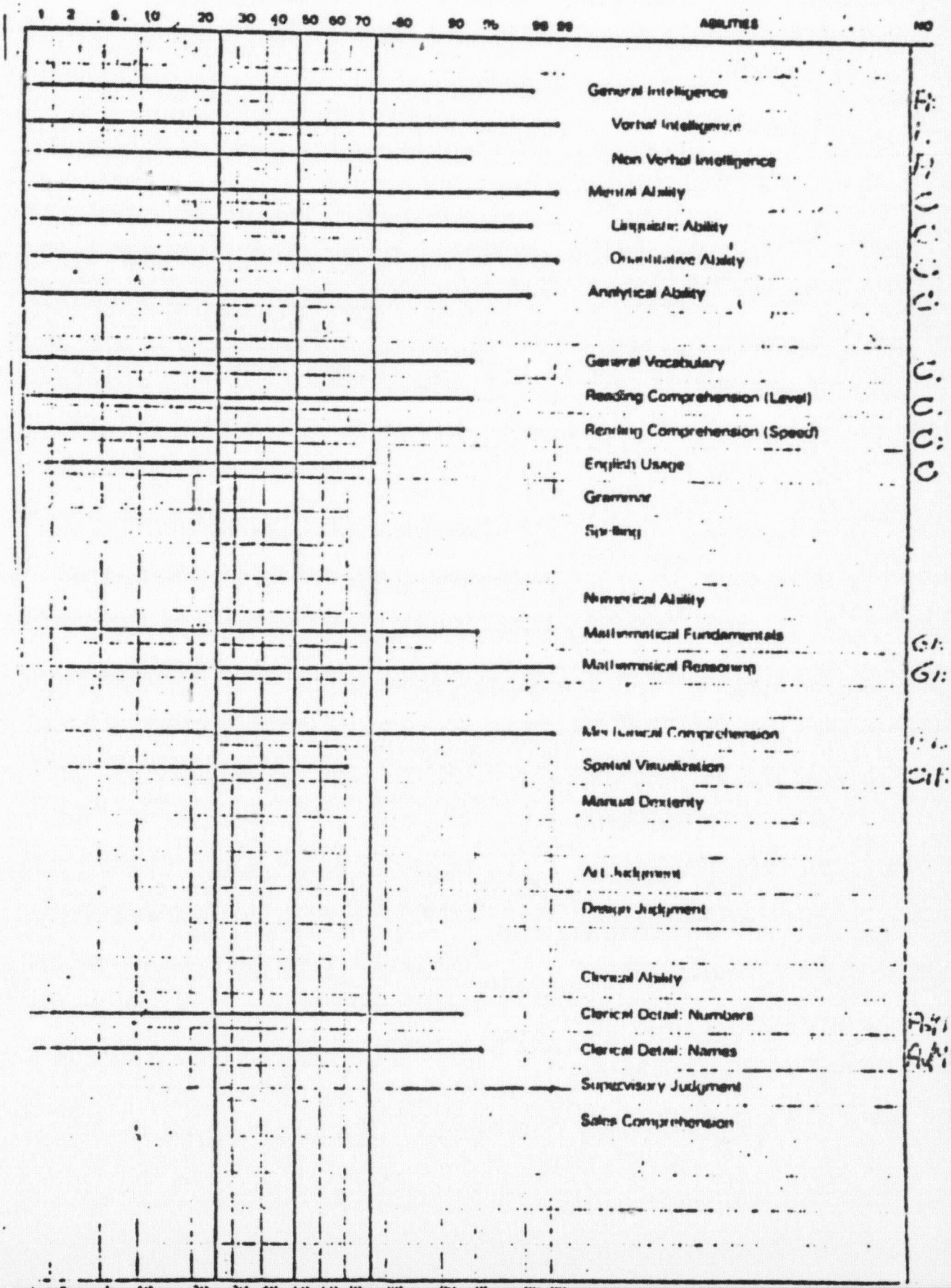
Member: A. Greenwich Medical Society.
B. American Psychiatric Association.
Connecticut Psychiatric Society.
Fairfield / Litchfield Chapter.
C. Group for the Advancement of Psychiatry (Psychiatry and Religion).
D. American Group Psychotherapy Association, Inc.
E. American Editorial Board, Israel Annals of Psychiatry and Related Disciplines.

Certification: American Board of Psychiatry and Neurology, 1973.

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HS - Grade 10 Girls CG - College Graduates GP - General Population Z - Standard Students, High Grade

Name Fielding, Brian Date 7/3/74 55 a



REPORT OF SHELDON GAYLIN, M. D.

A532

SHELDON GAYLIN, M. D.
560 GARTH ROAD
SCARSDALE, NEW YORK 10583
(914) 723-4040

57 a

December 12, 1974

Personal and Confidential

Brian Fielding
Premium Point
New Rochelle, New York

This 29 year old, white, single man was seen in a psychiatric diagnostic interview at the request of his lawyers, Messrs. Karpatkin, Pollet, and LeMoult of New York City. He was seen for well over three hours on two separate interviews on December 9th and 10th, 1974. Coincidentally, he had been seen briefly approximately 10 days earlier when he was admitted to the Psychiatric Division of the Westchester County Medical Center. This interviewer had available to him a document prepared by Dr. Leopold Bellak of 22 Rockwood Drive, Larchmont, New York, dated February 28, 1974 and several documents prepared by the firm of Karpatkin, Pollet, and LeMoult dated December 7, 1974. Doctor Michael Zales of Greenwich, Connecticut was consulted briefly to evaluate the current status of treatment.

When first seen, Mr. Fielding presented himself as a tall, well built, casually dressed young man appearing his stated age, demonstrating some pressure of speech and anxiety but at a level which was not considered inappropriate to the situation. Mr. Fielding indicated that he was undergoing a number of psychiatric interviews, simultaneously, in preparation for an impending court hearing. It was obvious that he wanted to be seen in a favorable light. He was particularly cooperative. Statements related to his history, to his legal problems and to his emotional state appeared to be consistent and truthful as far as this interviewer could determine. There seemed to be a minimum of self-serving statements.

A detailed developmental, family, social, sexual history was obtained including facts related to his current legal problems and a careful mental status was performed. Mr. Fielding gives a history of coming from a relatively well to do family in which the father and the older brother are described as "super-achievers". His father is described as an intensely obsessive, compulsive and successful individual, brilliant in every area of endeavor which he undertakes. Both he and his older brother were described as problem children until the older brother (3 years older) became involved in psycho-therapy and did a complete "turnabout". The older brother, quite dramatically, then became much the same kind of super achiever as the father, which included early admissions to prestige colleges, medical schools and high medical positions on a national level. Although not directly related by the client it is about this time historically that Mr. Fielding states he began to get involved with sexual experimentation with his male contemporaries. This followed an earlier, brief, and unsuccessful exploratory and frightening experience with a young girl slightly older than himself.

The sexual experiences related between the ages of 10 and 13 with members of his own sex are common historical findings which when related by an individual who later develops a normal heterosexual life would not be considered abnormal.

At the age of 10 he saw his first psychiatrist because he was "depressed, an underachiever and maintained security blanket." This is apparently an unfortunate relationship which was not helpful and possibly even destructive to him. This relationship with the psychiatrist lasted one year. He continued to do poorly in junior high school and high school, went to college and dropped out during the second year. He became severely depressed and had a second unhelpful experience with a psychiatrist and rejected further recommended treatment. Under pressure of his family related to constant arguments between his father and himself, he again attempted psycho-therapy in the summer of 1973 and this too was unsuccessful, primarily because he could not bear talking about his sexual problems. It was only after being apprehended by the police that he finally developed what appears to be a very successful psycho-therapeutic relationship with Dr. Michael Zales. He has been seeing him regularly 3 times per week since October of 1973. In the 14 months since he has been under treatment with Dr. Zales he has made excellent progress in a psycho-dynamic area which can be extremely difficult to treat and frequently takes a good deal more time than has been demonstrated here. Mr. Fielding indicated that not only has his sexual xxxxxtxx acting out been totally controlled (not unexpected considering his current difficulties with the law), but as noted by this observer, there has been significant changes in his fantasies, dreams, and other emotional involvements with his problems. These latter statements by Mr. Fielding were confirmed in direct conversation with Dr. Zales. He is clearly moving towards a normal heterosexual life style and he is thinking in terms of marriage and establishing his own family. There has been an equally dramatic turn-around in other areas of his life and life style. He has completed college, he has begun to participate in the family business and has apparently been quite successful at both.

In a careful mental status examination it is clear that Mr. Fielding is not psychotic. Although it is difficult to reconstruct essentially what may have been going on 14 months ago, it would appear that there were intense pressures to act out his sexual fantasies at that particular time in his life. There are clear cut psycho-dynamic factors involved related to power and dependency constructs which led him into a state in which his judgement was poor and reality testing was modified sufficiently so that he could easily have considered himself as contemporary of the 10 and 13 year old children with which he was involved. In his arrested adolescent state, he in no way imagined he was involved in criminal acts although he was aware that his acts were immoral and something to be ashamed of. This is a man who is fearful of violence towards himself and towards others and there is, nor has there been any indication of coersion or physical threat utilized with the youngsters involved.

I am convinced that as long as Mr. Fielding is under treatment and reasonable supervision one can state with all reasonable certainty that the behavior which called his attention to the court will not be repeated.

In addition, I feel there is an excellent prognosis for a successful treatment result that should assure with reasonable certainty that this behavior will not be repeated in the future, following the completion of treatment.

At the present time, Mr. Fielding is dealing with the remnants of some neurotic conflicts and for all intents and purposes except for his sexual aberrations which continue to need further treatment, he could be considered within the broad realm of a psychologically intact individual.

For Mr. Fielding to be incarcerated for any period of time would be a true tragedy in many ways. One, is that treatment which apparently has been quite successful, would be interrupted and probably totally negated. In addition, I know of no prison facility which can offer the kind of therapy that Mr. Fielding needs. Secondly, it would interrupt his ability to develop a normal social and sexual and family relationship which is absolutely essential to the well being of this young man.

Thirdly, the kind of behavior which brought this man to court would make any jail sentence extremely dangerous to him physically. I know of no jail or penitentiary in which he could be protected from abuse from fellow prisoners unless he were kept in solitary confinement. In discussions with local corrections officials, they indicate that even solitary confinement must be broken periodically and the chances of his being seriously hurt are great. Even if some way could be found to protect him, the constant anxiety related to the fear of personal attack would be constantly present and overwhelming burden. These anxieties plus long periods of isolation could lead to serious depressions, and the potential for self destructive behavior.

I would be glad to amplify in any appropriate form the above summary statement of my contact with Mr. Fielding. I am attaching for the courts use, a current curriculum vitae describing my experience and background.

Respectfully submitted,

Sheldon G. Gaylin

Sheldon G. Gaylin, M.D.
Director of Psychiatry
Westchester County Medical Center
Professor of Clinical Psychiatry
New York Medical College

SGG:lm
Encl.

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CURRICULUM VITAE

Name: Sheldon Gaylin, M.D.

Office Address: Director of Psychiatry
Vosburgh Pavilion
Grasslands Hospital
Valhalla, N.Y. 10595

Tel. No. 592-8500 - Ext. 2256

Home Address: 192 Fox Meadow Road
Scarsdale, N.Y. 10583

Tel. No. 723-3626

Date of Birth: 12/11/18

Place of Birth: Cleveland, Ohio

Citizen: Yes

Married: Yes

Education:

University of Chicago	1946-1949 Liberal Arts	Ph.B
Western Reserve University Medical School	1949-1953	M.D.
Columbia University Psychoanalytic Clinic for Training & Research	1954-1958	Certified in Psychoanalytic Medicine

Internship:

Montefiore Hospital (Mixed) 7/1/53 - 6/30/54

Residency:

Bronx V.A. Hospital 7/1/54 - 6/30/56
New York State Psychiatric Institute 7/1/56 - 6/30/57

Hospital and Clinical Appointments:

Assistant Attending Psychiatrist, Vanderbilt Clinic, Columbia Presbyterian Medical Center - 1957 to present.

Assistant Attending Psychiatrist, New York State Psychiatric Institute, 1957 to present.

Lecturer in Psychopathology - Postgraduate course in Neuropsychiatry - Columbia University - 1958-1962

Training and Supervising Analyst - Columbia University Psychoanalytic Clinic for Training and Research, 1964.....present.

Course
101A Freud's Work: Historical development of Freudian Theory- with Aaron Stern, 1964
Admissions Service - 1959-1964

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Hospital & Clinical Appointments (cont.)

Director, Westchester County Community Mental Health Services - December 1960 - September 1965.

Assistant Clinical Professor Psychiatry, College Physicians and Surgeons, September 1966 to June 1969.

Member - University seminar on Violence and Human Maladaption - Columbia University - 1958 to present.

Attending Psychiatrist - Grasslands Hospital - 1961
(Supervised residents; Courses on Community Psychiatry for residents)

Consultant to New York City Community Mental Health Board-Mental Health Center Program Development - September 1965-1967.

Chief, Section on Program Development, Division of Community Psychiatry of the Department of Psychiatry and the School of Public Health and Administrative Medicine, College of Physicians and Surgeons - September 1965 to June 1969.

Director - Psychiatric Division, Grasslands Hospital, March 1969 to present.

Associate Professor of Psychiatry, N.Y.U., Medical College, March 1, 1969 to present.
Professor of Clinical Psychiatry, New York Medical College.

Licensed to Practice Medicine:

New York 1954
California & Ohio 1954

Specialty Certification:

American Boards of Neurology and Psychiatry (P) 1958

Other Certification:

Certification - Psychoanalytic Medicine - Columbia University, College of Physicians & Surgeons - 1958

Certified Mental Hospital Administration
American Psychiatric Association - 1966

Medical or Professional Societies:

American Psychiatric Association (F)
American Psychoanalytic Association
American Public Health Association (F)
Association for Psychoanalytic Medicine
County and State Medical Association
Westchester Psychoanalytic Society - Secretary, 1963-1964
Westchester Psychiatric Society - Treasurer, 1964-1966
President, 1969-1970

Special Appointments

Member - Advisory Committee to Outpatient Studies Section - National Institute of Mental Health, 1964-1967

Member - (1) Executive Committee, New York State Planning Committee on Mental Disorders, Mental Health & Retardation; and Chairman of its Task Force on Children, 1963-1965 - Author of final report.

(2) Westchester Committee on Poverty 1961-1965
(3) County Executive Committee on Narcotics Addiction, 1963-present
(4) Chairman - N.Y. State Regional Advisory Committee on Aging and Chronically Ill, 1961-1965.
(5) Westchester Citizens Committee on Aging and Chronically Ill, 1961-1965
(6) Chairman - Committee on Law and Psychiatry, Westchester Psychiatric Society - 1966-1968
(7) Board of Medical Directors Futura House
(8) Medical Advisory Committee Mental Health Association of Westchester.

Publications:

1) The Antigenic Variation of Influenza B Viruses. Demonstration of an Antigenic Spectrum by use of Titer Ratios, with William S. Jordan, Jr., Journal Immunology, Vol. 70, Pps. 393-399, April 1953.

2) Psychiatric Planning at the Community Level, American Journal of Psychiatry, Vol. 121, No. 2, pp. 153-159, August 1964.

3) An Inventory of the Clinic Patient Load in a Community Mental Health Program, Complete report, Mimeographed September 1, 1964 with Stauffer and Mallach.

4) Final Report - Task Force on Services to Children - New York State Planning Committee, July 1, 1965.

5) Data Utilization for Local Mental Health Program Development, Community Mental Health Journal, Volume 3, No. 1, Spring 1967 with Moore, Bloom, Pepper, Pettus, Willis, and Bahn.

6) Book Review, American Journal Public Health, April 1968
"Psychiatric Epidemiology and Mental Health Planning" Ed. by Monroe; Klee; Brody Psychiatric Research Report No. 22, Washington D.C. American Psychiatric Association 1967.

7) Book Review, American Journal Public Health, May 1969
"Psychiatric Aftercare: Planning for a Community Mental Health Service" Silverstein, University of Pennsylvania, Press 1968.

Publications (cont.)

8) The Adolescent and The Mental Health Center, Chapter 6, pps. 61-69 In "Mental Health Services for Adolescents", Edited by Sol Nichtern, M.D., Frederick A. Praeger, Inc., New York, 1968.

9) Book Review, Psychoanalytic Quarterly, Vol. XXXIX, Fall 1970, No. 3 Psychosomatic Specificity, Volume 1, Experimental Results, Ed. by Alexander, French, Pollock, University of Chicago, Press 1968.

10) Book Review, American Journal of Public Health, December 1970, Volume 15, No. 12 with Giges of Community Mental Health, Edited by H. Grunebaum, Boston, Mass., Little Brown.

11) Serum Creatine Phosphokinase (SCPK) and Aldolase in Psychiatric Patients, with Craig, Berk, submitted to Archives of General Psychiatry April 1971.

REPORT OF LEOPOLD BELLAK, M. D.

14 694-7878

A540

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LEOPOLD BELLAK, M. D.
22 ROCKWOOD DRIVE
LARCHMONT, N. Y. 10538

December 10, 1974

Dr. Michael R. Zales
Edgewood Drive
Greenwich , Connecticut 06830

As requested, I saw your patient, Brian Fielding again on December 6, having previously examined him extensively in December, 1973. I reviewed his course of treatment with you and hislife situation since I last saw him.

It is important that he does indeed have a good relationship with you, in distinction to the psychiatrists he had earlier in his life. He appears willing and interested in utilizing treatment. I asked him to give me an account of what he has learned about himself and his difficulties. This account shows increased insight into his problems, especially the compulsive need he had shown in the past to arrange circumstances in such a way as to cause himself trouble.

Even more important seems to me that the underlying conflicts with his family seem to have considerably improved. These were, as I had noted before, basic to his adjustment problems. He now is able to work with his father, gets along with his mother and has a closer relationship with his brother than the previously highly competetive one. I believe one could write the equation that the better his relationship to his family, the sounder his personality constellation.

Mr. Fielding was certainly under a great deal of strain from the legal proceedings and very anxious about his future. I suppose that it must be difficult at present to work on his deepest lying problems while there is acute anxiety about his fate.

Mr. Fielding needs expert care--and when hopefully his current trial is over, I would suggest even more intensive treatment with you, rather than less, as classically analytic as possible. Such treatment is not available in prison or any of our public institutions. Therefore, I do not believe that either Mr. Fielding or the community could profit from prison. Both would be likely to suffer from it, if he not to be worse from lack of highly sophisticated treatment and the conditions in prevailing jails, ofwhich Mr. Hoffa (no civil libertarian or tender heart) has spoken so eloquently.

As you may know, I feel very strongly about the right of society to protect itself against asocial behavior even if that asocial behavior is due to emotional problems. I understand that Tom Szasz has attacked me for some of my published views on that score in his most recent book, and Torre has also criticized me for "authoritarian views" in the Washington Post and other publications. Among other things, they have criticized me for not only demanding that all school children be screened for emotional problems and help offered when there are some, but also for suggesting that we need laws to enforce treatment of child or family if not voluntarily engaged in. If emotional problems--or for all I care, brain injury--lead among other things to violence or other behavior that could hurt the community I believe that the community has a need and a right to protect itself by insisting on treatment or isolation. We have laws governing communicable disease, have insisted on quarantining people or would not let children enter school without smallpox vaccinations. I see mental health as a similar case of public health. (See enclosed reprint)

If it were determined that Mr. Fielding has personal adjustment problems which could affect the community adversely, my viewpoint would be the same.

On the other hand, I don't believe that jail would present either a short term solution or a long term solution for Mr. Fielding or the community. Jail has no corrective effect on complex emotional difficulties, to my knowledge. It has adverse ones, as I learned when I was at St. Elizabeth's Hospital, which had a maximum security hospital facility for federal prisoners. My experience was the same when I was Director of Psychiatry at City Hospital in Elmhurst, Queens, and had as one of my wards a prison ward (for female prisoners--Bellevue had the male prison ward). In that connection, I was also on friendly terms with Anna Cross, the then Commissioner of Correction, and frequently visited the Women's House of Correction with her, to discuss some possible reforms. I certainly never ran across a case of sexual maladjustment who did not get worse in prison.

If Mr. Fielding may stay in treatment with you, I am, as in all instances of possible social or emotional contagion, in strong favor of all possible conditions of probation to protect the community's interest. Just as food handlers should not be typhoid Mary's, emotional liabilities must be controlled. It is not an easy matter, as we surely don't want to act like the Russians and create precedents for jailing political dissenters.

On the other hand, the laws for quarantining physically contagious people have not be abused in this country.

If, as I hope, Mr. Fielding is permitted to continue treatment with you, I should be glad to have a chance some other time to consult with you.

Yours,

Leopold Bellak, M.D.

Visiting Professor of Psychiatry
Albert Einstein College of Medicine

Research Professor of Psychology
Postdoctoral in Psychotherapy
New York University

Clinical Professor of Psychiatry and
Behavioral Sciences
George Washington School of Medicine

Consultant to West Point Military Academy
Consultant to Westchester Mental Health Association

LEOPOLD BELLAK, M. D.
88 ROCKWOOD DRIVE
LARCHMONT, N. Y. 10538

PERSONAL AND CONFIDENTIAL

Bryan Fielding
Premium Point
New Rochelle, New York

This 28 year old single male was seen in psychiatric consultation on request of his attorney for two hours on December 17, 1973, on December 20, 1973 and on January 8, 1974. Aside from a diagnostic psychiatric and psychoanalytic interview, this young man was systematically examined on my Ego Function Assessment Scale and was also given the Thematic Apperception Test (T.A.T.).

He is the younger son of an assertive and successful father and a mother who has been characterized by the patient as frequently losing her temper and being self-preoccupied. This young man also grew up in the shadow of a supposedly preferred, very competent three year older brother who is now a doctor of medicine in the United States Public Health Service.

This was apparently a shy, frequently depressed boy who cried at night, had few friends, felt awkward and a failure and specifically unappreciated by his father.

He still needed a security blanket at age ten and a child psychiatrist was then consulted. He also was depressed in his first college year and sought psychiatric treatment for it. He is currently being treated psychoanalytically by Michael Zales, M.D. of Greenwich, Connecticut.

After High School, he entered Lafayette College from which he dropped out after one year. Then, for the first time, he "found himself" when he started coaching sports and eventually Mamaroneck Midget Football League with a great deal of success. This apparently not only allowed him to be the hero he had never been before, but he also was accepted in many children's homes. This setting, like his athletic activities, was an attempt to cure what had ailed him as a child--to feel big and to be loved. He was not only playing father to the children, but in turn felt he was adopted into their families. These seemed warmer to him than his own family had been.

His sexual maladaptation seems to have been specifically precipitated by the fact that he had sustained several knee injuries which needed surgical operations. This made the active hero role impossible and facilitated the disturbed sexual one.

The underlying feeling of weakness and fear of being overpowered existed apparently lifelong; it was for a while successfully warded off by his athletic career in the Little League and then emerged again. This image of himself as helpless and endangered is borne out by a dream he had prior to an appointment with me in which he was on a surf board threatened by a gigantic tidal wave. He told me that he had a nearly lifelong fear of tidal waves. This is probably consistent with his feeling towards his father.

After the clinical interview, Mr. Fielding was also appraised in detail on the Ego Function Assessment Scale (see attached). This follows a method worked out by a team of which I was Principal Investigator in five years of research and consists of the study of such aspects of the personality as reality testing, judgment, impulse control, thought processes, social relationships and others, twelve in all. It appears that the sexual acts involved defects of reality testing, judgment and impulse control, but within the neurotic range. He also reports a similar loss of judgment and impulse control when playing football, very often completely disregarding danger. Aside from these functions, he seems to have a low stimulus barrier for noise. I am not entirely certain of the significance of this latter fact.

Subsequently, the Thematic Apperception Test (T.A.T.) was administered. This is a personality test which consists of a series of pictures to which the subject is asked to tell stories. The results suggest that this man has difficulty in expressing or dealing with or integrating aggression. He did not see the guns in 3 BM in picture #8, and when pointed out to him, was unable to use them in realistic stories. Little family relationship was reflected in relation to picture #2. His responses to picture 7 BM indicate a strict conscience and the response to 13 MF shows strong guilt feelings about heterosexual behavior which need exploration and treatment.

In summary:

I used the dream material and T.A.T. stories very extensively especially to test this man's ability for dynamic insight and his ability to utilize interpretations and to work them through by applying them to other aspects of his life and personality.

This ability for insight and for profiting from it appears to be very good. He is aware of the asocial nature of his acts and of their danger and harm to himself. Furthermore, I believe that this man's sexual deviation is dynamically clearly consistent with his life history and the rest of his personality. His ego structure is generally well within normal or neurotic limits.

In view of all the above and of the transparency of the psychological configuration, the essential intactness of his ego, the presence of guilt and the general mental intactness of this man, it is my considered professional opinion that he will profit from highly skilled psychoanalytic psychotherapy. I see such therapy as taking place from three to five times a week and probably lasting three to four years. I see such skilled psychotherapy as a complex way of unlearning distorted ways, and relearning ways of seeing oneself and others: this man had learned to see himself as small, incapable of filling an adult male role like his father, scared of adult heterosexual roles; he needed to be a bigshot and a child to satisfy needs he could not satisfy in childhood. In therapy he will become aware of the past situations that have shaped his perceptions and motivated his behavior, and gradually reshape them. In the introduction to a popular book on psychotherapy (THE TALKING CURE by Morton Hunt et al., Harper and Row, 1964) I have compared this process to rearranging the components of a kaleidoscope. (Photocopy enclosed) Such therapy would also have a supervisory as well as a supportive (and basically restructuring) effect. Under such circumstances he will not be a danger to society or himself, though I would advise against any occupational activity with boys until such time as the therapist decides it is advisable.

Under such circumstances of proper treatment, this young man will eventually attain a normal sexual life and will generally be able to function well socially and occupationally.

Leopold Bellak, M.D.
February 28, 1974

WHO's WHO in the East 1974

BELLAK, LEOPOLD, psychiatrist, psychoanalyst, psychologist; b. Vienna, Austria, June 22, 1916; s. Siegfried and Marie (Weiler) B.; came to U.S., 1938, naturalized, 1942;; student Vienna Med. Sch., 1935-38; M.A., Boston U., 1939; M.A., Harvard, 1942; M.D., N.Y. Med. Coll., 1944; m. Sonya Sorel, Dec. 20, 1939; children—Karola, Katrina. Intern, resident St. Elizabeths Hosp., Washington, 1944-46; practice medicine, specializing in psychiatry, psychoanalysis, Larchmont, N.Y., 1946-—; research prof. psychology postdoctoral tng. program N.Y.U., 1965-—; clin. prof. psychiatry Sch. Medicine, George Washington U., 1970-—; vis. prof. edn. and psychology Tchrs. Coll., Columbia, 1965-69; vis. prof. psychiatry Albert Einstein Coll. Medicine, 1971-—; cons. U.S. Mil. Acad. at West Point, Mental Health Assn., Westchester County, 1966-—; prin. investigator, project dir. Nat. Inst. Mental Health grants, 1961-—. Mem. adv. bd. Guidance Center, New Rochelle, 1960-—. Served with M.C., AUS, 1942-46. Recipient Ann. Merit award N.Y. Soc. Clin. Psychologists, 1963. Fellow Am. Psychiat. Assn., Am. Psychoanalytic Assn., Am. Psychol. Assn., Am. Orthopsychiat. Assn., Soc. Projective Techniques, Royal Soc. Medicine; mem. N.Y. Soc. Projective Techniques (pres. 1952-56), Soc. Projective Techniques (pres. 1957-58), Rorschach Inst. Westchester Psychoanalytic Soc. (pres. 1962), Sigma Xi. Established Trouble Shooting Clinic Queens, N.Y.C., 1958. Author books, texts and scientific articles. Office: 22 Rockwood Dr Larchmont NY 10538

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BIBLIOGRAPHY

of Leopold Bellak, M.D. (as of June 1967)

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REPORT OF IRVING BIEBER, M. D.

Report of Psychiatric Examination

Brian S. Fielding

December 15, 1974

I saw Brian S. Fielding on December 8, 1974 in a lengthy psychiatric consultation enduring for over four hours. He described in detail all the events preceding his arrest and all those events relating to his trial and conviction. He informed me that he is coming up shortly for sentencing. My psychiatric examination and this report is oriented to furnishing the sentensing judge with relevant psychiatric data and a professional opinion.

In early childhood, Brian saw relatively little of either parent. His father is a successful businessman, very much taken up with his work; his mother has always been active socially and philanthropically. Brian's early rearing was assigned to a nursemaid, a Hannah Quinn, who infantalized him and subverted what parental authority there was. He recalled that she often said, "Your parents don't really care about you. I'm the only one who really loves you." Brian's mother has told him that she remembers Hannah Quinn saying to him, "You don't need your penis. I'll take it from you." Though the intensity of Miss Quinn's contact with the boy began to decrease after his third year, she remained in the employ of the family until Brian was ten years old.

Brian described his childhood relationship with his father as "miserable." He saw little of him and when he

did his father paid him hardly any attention. Mr. Fielding clearly preferred his older son, Jonathan, three years Brian's senior.. According to Brian, his brother was "the apple of my father's eye." In recalling incidents and situations from childhood, Brian talked about the atmosphere around the family dinner table. The father would carry on conversations with Jonathan while ignoring Brian's questions or comments. He felt shut out and overlooked. Yet, Brian greatly admired his father and still does despite the severity of the paternal rejection. He considers his father to be a genius. He thinks his mother is very beautiful but has only average intelligence. In probing his attitudes to women, I asked whether he has ever known a woman who was brilliant; he said he had not. Mrs. Fielding's relationship with Brian became a close one during his later childhood and adolescence. He told me that the only one with whom he had a genuinely positive relationship was with his mother. He also had an affectionate relationship with his maternal grandmother, a simple, European woman who was able to communicate her love for the boy without shadows and ambiguities.

Brian had practically no dealings with his brother until after his arrest. Of Jonathan he said, "He was a miserable son-of-a-gun. He was very troubled as a youngster and played hookey a great deal; he wasn't very well liked." Jonathan was treated by a psychiatrist, Dr. Maurice Friend, between the ages of 13 and 15. After this period he underwent

a dramatic change. He became an industrious student, was Phi Beta Kappa in college, entered and completed Harvard Medical school and went on to become successful in his chosen field.

Brian's preadolescent peer group relations were not satisfactory. He never felt like one of the group and he was afraid of other boys. He remembered an occasion when a group of boys threatened to strip him. He was embarrassed because he thought his penis was very small and he felt ashamed to be seen nude; he was frightened because he perceived the attempt to strip him as an expression of hostility. He had very few close friends. Mr. Fielding once accused him of choosing friends who were his intellectual inferiors, ones he could dominate. Brian agrees with this appraisal.

Brian was a top student, particularly good in mathematics, up until junior high school. He had enjoyed school and was well liked by his teachers. Then his grades began to slide. His work was just about average in high school where he was considered to be an underachiever. He scored in the 600's and 700's in his college entrance boards, scores that indicate his superior intelligence. He graduated from high school in 1963 and entered Lafayette College. He achieved a B average in his freshman year but dropped out shortly after the beginning of his sophomore year.

Since 1965 Brian has held various sorts of jobs; the longest lasted for one year when he was a teller at the First National Bank. Prior to his arrest in October 1973, Brian's only real success was his football coaching. He attained professional caliber as a coach. He started this pursuit in 1966 as an assistant coach for the Bears, one of the teams in the Pop Warner League. In 1969 he became coach for the Colts of the Junior Pee Wee League. His team was composed of boys between the ages of 8 and 10. He coached this team to an undefeated season and was then promoted to head coach for the Lions of the Pee Wee teams whose members were between the ages of 10 and 12. His team won all its games in the 1970 season and was proclaimed the national champion of the Pop Warner League in which several thousand teams competed. That year Brian spent all his time studying football and coaching. All this work was unpaid. He was supported by his father.

From 1969 to 1970 Brian was president of the Mamaroneck Midget Football League and in 1970-1971 he became Commissioner of the Westchester County Pop Warner and Junior Football Leagues. In 1971 his team, the Lions, was again undefeated and was selected for the Thanksgiving game which took place in Dallas. The team won. The next year, a team made up mostly of new players maintained this impressive winning record including all the games in 1972 and the Thanksgiving game which in that year took place in Florida. Clearly,

Brian was an extraordinarily talented football coach, the one area where he developed and exercised his talents. In off-season periods he spent his time unproductively and was chronically depressed.

Brian's psychiatric history goes back to his childhood. As has already been indicated, he was a very insecure child. At the age of 11 he was still attached to his security blanket which he called "Binkie." He would rub the blanket with his hand and his tongue would go into sucking movements. He also had teddy bears as security objects until late in childhood. His two summers at camp were described as nightmares. He was frightened of the other boys and anticipated sadistic behavior. At the age of 12 he was treated psychiatrically by Dr. Joseph Lander but there was little benefit. In 1964 when Brian was 19, he became depressed and anxious. He sought out his brother's psychiatrist and was treated for a brief period but after a few sessions discontinued. In 1969 he consulted Dr. Donald Cole but again had only a few sessions before discontinuing. After his arrest in October 1973, he voluntarily admitted himself to the Westchester Division of Payne Whitney Hospital. The psychiatrist who treated him, according to Brian, told him that voluntary commitments were meaningless and that he would be kept there for a very long time. Brian says he is claustrophobic and cannot tolerate confinement. He became panicky at this hospital and prevailed upon his parents to transfer him to Greenwich

Hospital. There he met Dr. Michael Zales, his present therapist. He has been working with Dr. Zales since then and sees him three times a week. Before his treatment with Dr. Zales, all Brian's contacts with psychiatrist had been unplesant and unproductive.

Brian's life has taken a dramatic turn for the better since his arrest. His father has entered actively into the picture and has established the kind of constructive relationship with his son that should have obtained in the past. Brian has been integrated into his father's enterprises and each consults with the other daily. Mr. Fielding has developed a genuine respect for Brian's intelligence and capabilities. Brian has returned to college and is enrolled at New Rochelle College where he has been doing well in his studies. He is due to get his degree in June, 1975.

Brian has been working productively in his psychotherapy and has been acquiring insight into the problems that have caused him so much difficulty. There have been no abnormal behaviors of any type in the past year.

It is my considered opinion that Brian Fielding should be placed on parole and not be remanded to prison for the reasons that follow. For one year now, Brian has been leading a constructive, exemplary life. In the past fourteen months he has established a positive, mutually respecting and affectionate relationship with his father. Brian has entered into his father's business in a job that interests him and

offers a promising future. In addition, he is completing college.

I have concluded from my many years of clinical experience with over 800 male homosexuals and as demonstrated in an extensive nine year study of which I was director and senior author (Male Homosexuality--A Psychoanalytic Study of Male Homosexuals, published by Basic Books, Inc. 1962) that the father is the central and most determining figure of a homosexual outcome in a son. It is my opinion that male homosexuality cannot develop if a son has a father who is lovingly and constructively related to him. I have written on this point extensively and stated my views publicly on many occasions. My work with homosexuals and that of my colleague and associate, Dr. Toby Bieber, indicates that the most significant prognostic factor in the resolution of a homosexual pattern is the destiny of the father-son relationship as therapy and life experience unfold. The fact that Brian and his father have come together and have built a relationship of affection and trust and respect is, in my view, the most important positive factor in Brian's prognosis. I have often observed among adult patients the remarkable reparative effect when a father who had been an inadequate and traumatic parent changes to become a constructive influence. Further, for the first time Brian is being treated by a psychiatrist with whom he is working well and he hopes to continue his psychiatric treatment for as long a period of time as is necessary to completely extinguish his psychiatric symptoms and difficulties. A jail

sentence at this time would terminate and vitiate all that has been accomplished. With Brian's past psychiatric history of claustrophobia, anxiety and depression, it is predictable that incarceration would precipitate an agitated depression with a serious probability of attempted suicide.

As a scientist I must consider the logic involved in sending Brian to jail as well as its effects on him and the community. It might be argued that punishment would produce an aversive reaction to antisocial behavior and would prevent its repetition. The high rates of recidivism in psychiatrically untreated prisoners do not, however, support this view. What prevents repetition of antisocial behavior is the resolution of the psychopathology that motivates such behavior and this is accomplished in the type of psychotherapy Brian is now undergoing. Whatever aversive influences punishment can conceivably exercise have already had its effect through Brian's arrest, the humiliation involved, the loss of his well earned popularity as a football coach, the loss of friends and all the realistic threats that accompany a conviction. It may also be argued that the juvenile community will be safer. The question is whether pedophilic acts do, in fact, inflict serious injury; for example, do pedophilic acts imprint a homosexual destiny in children who otherwise would remain heterosexual? In the study on homosexuality to which I referred earlier, it was demonstrated that a homosexual adaptation is forged within

the nuclear family. Sons do not become homosexual if the relationship with the parents is not conducive toward developing a homosexual pattern, no matter that a child experiences the type of event we are considering. An important study by L. J. Doshay concerns this researcher's follow-up of a series of 108 boys who had been sexually seduced between the ages of 7 and 16. None in this group became homosexual as adults (The Boy Offender and His Later Career, Grune & Stratton, N. Y., 1943).

The above comments should not be construed as minimizing the seriousness of pedophilia nor as a justification for it. I merely wish to point out that the usual response to pedophilia as a heinous crime and utterly destructive to children and to their future is not born out by scientific study. Parenthetically, such prejudiced attitudes are apt to be distributed in higher frequency and qualitatively of greater intensity in the less educated and undeveloped segment of the population. This, of course, would include most prisoners who, paradoxically, are often extremely pseudo-moral and tend to be sadistic to child sexual offenders. This type of attitude constitutes an additional threat to Brian's sanity and integrity if he is imprisoned.

Brian has been totally free of aberrant behavior for over a year. It appears to me that his incarceration at this time would be without purpose.

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		DEGREE:	YEAR:
EDUCATION:	New York University	B.S.	1927
	New York Univ. Med. College	M.D.	1930
	N.Y. Psychoanalytic Inst.		1937-1941
	Association For The Advancement of Psychoanalysis	Certified	1941

ATURE & WHEN LICENSED: New York 1930 #24730

BOARD CERTIFICATION & DATES: Diplomate Am. Bd. Neurol & Psychiatry, 1939

MEMBERSHIP IN MEDICAL & SCIENTIFIC SOCIETIES:

New York County Medical Society
A.M.A.
Life Fellow Am. Psychiatric Ass'n
Soc. Medical Psychoanalysts (Pres. 1951-1952) 1963
American Academy of Psychoanalysis; President 1971-2; Chairman of Executive Council 1972-3
Fellow N.Y. Academy of Medicine

ALL TEACHING & ASSOCIATION APPOINTMENTS GIVING TITLES, INSTITUTIONS, & DATES:

Research Ass't, with rank of Instr., Dept. Physiol., Yale Med. Coll., Jan. 1933-July 1
Ass't in Psychiatry, New York Univ. Med. College, 1936-1937
Instr. in Neurology, College of Phys. & Surg., 1936-1937
Ass't Clin. Prof. of Neurol., N.Y.U., College of Med., 1947-1949
Assistant Clinical Professor of Psychiatry, New York Medical College (Post-graduate Psychoanalytic Div.) 1948-1954
Assoc. Clin. Prof. of Psychiatry, N.Y. Medical College, 1954-1963
Associate, Sloan-Kettering Institute, Nov. 1, 1956 - June 30, 1960
Associate Clinician Sloan-Kettering Institute, July 1, 1960 -
Clinical Prof. of Psych., N. Y. Medical College, 1963 - Present

ALL HOSPITAL & LABORATORY APPOINTMENTS GIVING OFFICIAL TITLE, INSTITUTIONS, DATES:

Interne, rotating, Medicine, Lincoln Hospital, July 1930-July 1932
Resident in Tuberculosis, Sea View Hospital, July 1932-Jan. 1933
Resident in Neurology, Montefiore Hospital, July 1933-Sept. 1934
Ass't Alienist, Bellevue Psychiatric Hospital, Sept. 1934-Jan. 1937
Private practice of Neuropsychiatry & Psychoanalysis, 1937 -
Adjunct Neurologist, Mt. Sinai Hospital, 1937-1947
Ass't Attending Neuropsychiatrist, Queens General Hosp., 1935-1942
Consulting Research Psychiatrist, Memorial Hospital, July 1, 1954-July 1, 1957
Associate Psychiatrist, Flower-Fifth Avenue Hospital, 1954-1963
Research Neuropsychiatrist, Memorial Hospital, July 1, 1957-
Psychiatrist, Flower-Fifth Avenue Hospital, 1963-present
Visiting Psychiatrist, Metropolitan Hospital, 1963-present

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MILITARY SERVICE: Med. Corps., A.U.S., Aug. 1942-March 1946

PRIZES & AWARDS: Hoffman Award ( ) American Psychiatric Assn.-1964
Students Assoc. Award - N.Y. Medical College 1971

November 24, 1972

SIGNATURE..... DATE.....

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Davison, C. and Bieber, I.: Premotor Area; Its Relation to Spacticity and Flacidity in Man, Archives Neurol. and Psychiat. 32: 936-72, Nov. 1934.

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. Bieber, I. — The Psychosomatic Symptom, Basic Problems in Psychiatry, Wortis, J., Grune and Stratton, 1953, pp. 126-146.

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. Bieber, I. — Olfaction in Sexual Development and Adult Sexual Organization, Amer. J. of Psychotherapy, Vol. XIII, No. 4, p. 851, Oct. 1959.

. Bieber, I. and Drellich, M.: — Female Castration Complex, J. Nerv. and Mental Disease, Vol. 129, Sept. 1959, p. 235.

26. Bieber, I. — Olfaction in Sexual Development, Psychoanalysis and Human Values, Ed. Jules Masserman, Grune & Stratton, 1960, N.Y., p. 201.

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REPORT OF ROBERT L. SADOFF, M. D.

98 a

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Psychiatric Report of Brian Fielding

Date Examined: December 16, 1974

Brian Fielding is a twenty-nine year old single, white, real estate investment specialist who was referred for psychiatric examination following his conviction in New York on charges of sodomy, sexual abuse and endangering the welfare of a minor. Mr. Fielding is a tall, well-dressed, pleasant, bright young man who appears his stated age and presents his difficulties in a clear and relevant manner, without evidence of psychotic thought disorder, hallucinations or delusions. He is well-oriented and his memory is not impaired. He is cooperative, sincere and motivated for constructive goals.

Past History reveals that Brian was born the younger of two boys having an older brother, John, currently age thirty-two, a pediatrician working for the Government in Washington. Brian describes his father as obsessive-compulsive, distant, one whom he saw relatively little as a child. He saw his mother as one who seemed to favor Brian, take his side and tried to give him attention. He felt he grew up insecure and by age ten, continued to have a security blanket. He was encouraged to see a psychiatrist at the age of ten or eleven, and did see a Dr. Lander. He said very little was accomplished and at the end of the session, after one year, he felt he was berated by the doctor and had bad feelings about psychiatrists, as a youngster. The second time he saw a psychiatrist was after he was at Lafayette College for about a year and was not doing well emotionally. He saw a Dr. Maurice Friend, chosen by his parents. This was apparently the doctor who had seen his older brother several years previously and had known his parents through the brother's sessions. He felt Dr. Friend was no help to him and only went one time. The third psychiatrist he saw was Dr. Coleman, in his mid-twenties, for several sessions. He said he resisted therapy, had twenty appointments but kept only six. He wanted to talk with Dr. Coleman about his sexual confusion, but had great difficulty in bringing this material into the sessions.

His only positive contact with psychiatry has been Dr. Zales who is his current therapist. He says he sees Dr. Zales three times a week and has been doing so for the past fourteen months. He feels a good rapport with Dr. Zales, feels he has achieved much in therapy with him and plans to continue for as long as is required.

His past sexual history reveals the following recollections: First he said he was exposed to a sexual difficulty by a nurse that his parents had hired. He does not recall this episode, which occurred somewhere around the age of one to three. He said he does not recall prior to the age of six. His mother had told him recently that she had walked in on the nurse telling him when she was dressing him that he did not need his penis, he'd be better as a girl. He said he does not remember that episode. His next sexual involvement was at the age of seven or eight when he said he was shrewd and saw a girl naked in exchange for her looking at his bare feet. What bothered him was that because of her behavior he had the distinct impression that there was a tunnel between the vagina and the anus in a little girl. He said he was introduced to mutual masturbation with boys at the age of eleven and a half. He was also concerned about sexual relations with women, that that was something to be done only after marriage. He said he had an anxiety about women, sexually, and was involved only sporadically with adolescent boys when he was an adolescent in mutual masturbation activity.

His first experience at heterosexual intercourse at about age twenty, was a negative one; he was anxious, frightened and the experience was not pleasant. Subsequently he has had some pleasant heterosexual experiences but they were always associated with women for whom he did not care emotionally. He has experienced a deep friendship with a woman but has no sexual interest in her.

He describes his relationship with the athletic league in football as the high point of his life in the sense of pleasure obtained from activities for which he received much positive comment, praise and promotion in his social standing. This was especially important for him because it was an area that both his father and brother did not enter and he could find his own place in a most successful and productive manner. He was involved in community aspects of the football team, giving talks, attending meetings and obtaining much satisfaction from his position at the success of his football teams throughout the years. He said his

teams have never lost a game. This is very significant in view of the fact that his behavior is seen as even more compulsive and threatening to his position and the success he enjoyed.

He discussed his feelings of insecurity, depression, unhappiness about himself, despite his successful career within the community and in the football league. One of the means that he had of dealing with his depression was through sexual outlets. His involvement became more intense when he became more depressed.

It is significant to note the change in feeling, attitude and behavior during the past fourteen months since Brian has been in treatment. Prior to this time he has had a difficult relationship with his father, could not work effectively with him, but since therapy he has had much better relationships with his father and his mother, and feels more confident in himself, in his work, independently and with his father. His self-confidence is reflected in his improved sexual identity and his attempts at resolving many of the difficult and serious problems that he has had with sexual confusion in the past.

His means of handling his difficult emotional problems had been immature, impulsive and of a compulsive nature over which he had little control. The nature of this type of condition in the form that disturbed Brian is one of compulsive, uncontrolled expression of activities. The self-destructive aspect of this behavior is quite obvious and reflects his depressive feelings of low self-worth. It should be clearly understood that a number of people with sexual aberrations or misbehavior are reflecting, through the vehicle of sexuality, serious emotional conflicts which have little or no other means of expression. The turning point for these people is their arrests. It is then that the difficulties are brought into the open and when the individual is fortunate enough to begin intensive and necessary psychotherapy, he can resolve the underlying conflicts which lead to the expression of sexual misbehavior. It is essential that a person does receive such psychotherapy. Brian has been fortunate to have the services of a competent psychoanalyst, Dr. Zales, who is

treating him on an intensive, three times per week basis. Without this therapy Brian would continue with his sexual confusion and his serious emotional conflicts which would likely reach expression again without treatment. Because of his current treatment, his positive approach to it, and his commitment to himself and to his therapy, my prognosis for Brian's condition is good. Pedophiles can be treated effectively without concern of recidivism. It should be noted that Brian has focused in the past much of his emotional conflict into this one particular area and has been able to function quite effectively in a number of other areas which he continues to function well in. In fact, he appears to be functioning much better in other areas as well since he has learned of his conflicts and has begun to resolve them.

I would strongly urge that Brian be allowed to continue in his current constructive therapeutic path, which, in my opinion, is the only successful one for him at the present time. To take him out of his current situation and to place him in prison would be disastrous for several reasons:

1. Brian needs the treatment he is getting if he is to continue to be productive and contribute to society and not regress to his former level of activity.

2. Incarceration would undoubtedly cause such a regression in him and would undo much of the good that has occurred over the past fourteen months for him.

3. The real danger for a person convicted of this type of behavior in our prison system is evident to all who know anything about prisons. These men are harrassed, beaten and literally destroyed unless very special isolation methods are used to protect them from other inmates.

4. Brian needs to be in a heterosexual environment which will promote his constructive efforts toward heterosexual relationships. He is learning to join feelings of love and sexuality with women, but this will take time, experience and proper psychotherapy.

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For these reasons I would again strongly urge for a probationary disposition with mandated psychotherapy. I would expect the treatment to be required for several years and feel that, with this type of management and disposition for this particular individual at this time, would be the most constructive one for him and the best possible one in the interest of society. This dispostion would allow the rehabilitation of a formerly seriously distrubed young man so that he could make a distinct contribution to society and prevent further danger or threat to the youngsters in his community. Without such treatment and effective disposition, I would be very concerned about his prognosis.

Robert L. Sadoff, M.D.

I wish to describe briefly my experience in working with pedophiles and others involved in the criminal-legal process. I am currently Associate Professor of Psychiatry at the University of Pennsylvania, Lecturer in Law at Villanova University School of Law, Villanova, Pa. I have had a number of positions where I was evaluating or treating people involved in the criminal justice system. Initially I ran a forensic psychiatry clinic at Temple University, 1965-1966. Following that, from 1966 to 1968 I was Director of the State Maximum Security Forensic Diagnostic Hospital at Holmesburg Prison, where we were charged with the responsibility of examining and evaluating individuals within the criminal justice system in Philadelphia and reporting to the judges of the Common Pleas Court. From 1965 to the present, I have been Consultant in Forensic Psychiatry at Norristown State Hospital, where weekly I chair a conference, evaluating between four and eight individuals who have been arrested and convicted for serious criminal behavior.

For four years I was therapist of the Group Psychotherapy Program for Pedophiles at Philadelphia General Hospital, under the direction of Joseph Peters, M.D. During those four years I treated over fifty pedophiles in group psychotherapy. The dynamics of their difficulties were similar and I observed their treatment improvement, prognosis and emotional growth over the four year period. I am enclosing a copy of my curriculum vita on which you will notice the numbers of publications that I have had, several in the sexual area. I am enclosing copies of some of the more relevant papers that I have published. I will be having two chapters in the next edition of the Comprehensive Textbook of Psychiatry, edited by Freedman, Kaplan and Sadock, both in the area of sexual behavior and the law.

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Born; Minneapolis, Minnesota,
February 8, 1936

Education;

Bachelor of Arts (B.A.), University of Minnesota, 1956
Bachelor of Science (B.S.), University of Minnesota, 1957
Doctor of Medicine (M.D.), University of Minnesota,
School of Medicine, 1959
Master of Science (M.S.), University of California at
Los Angeles, 1963

33 Credits in Law, Temple University School of Law, 1963-1966.

Internship;

Wadsworth Veterans Hospital, Los Angeles, California,
General Rotating Internship: 1959-1960.

Residency;

In Psychiatry: UCLA Neuropsychiatric Institute, Los Angeles,
California: 1960-1963.

Military;

Captain, U.S. Medical Corps, Walson Army Hospital,
Fort Dix, New Jersey: 1963-1965.

Other;

Fellow in Forensic Psychiatry, Temple University Schools of
Law and Medicine: 1965.

Board Certification;

Certified in Psychiatry by the American Board of Psychiatry
and Neurology, May, 1966.

Robert L. Sadoff, M.D.

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Licensure: Licensed to practice in:

Minnesota
California
New York
Pennsylvania
New Jersey
Massachusetts

Current Academic Appointments:

University of Pennsylvania School of Medicine:

Associate Clinical Professor of Psychiatry;
Director, NIMH Program: Center for Studies in Social-Legal Psychiatry;
Chief, Unit in Family Law, Division of Family Study.

Villanova University School of Law: Lecturer in Law

Associate Editor, Bulletin of the American Academy of Psychiatry & Law
Editorial Board: Journal of Psychiatric Education
Editorial Consultant: Journal of Psychiatry and the Law.

Member: Manfred Guttmacher Award Board of the American Psychiatric Association, 1971 to 1974.

Lecturer in Law, Temple University School of Law: 1966-1972.

Temple University School of Medicine, Department of Psychiatry:

Clinical Assistant Professor of Psychiatry: 1970-1972
Instructor in Psychiatry: 1965-1969

Previous Appointments and Awards:

Unit in Law and Psychiatry:
Research Associate: 1965-1968
Training Supervisor in Forensic Psychiatry: 1968-1972
Director, Forensic Psychiatry Clinic: 1965-1966
Clinical Director, State Maximum Security Forensic Diagnostic Hospital, Holmesburg Prison: 1966-1968.

Associate Psychiatrist: State Correctional Institution at Philadelphia, 1965-1968.

President: American Academy of Psychiatry & the Law, 1972-1974.

Member, Board of Directors: Montgomery County Mental Health/Mental Retardation Ass'n., 1972-1974.

Robert L. Sadoff, M.D.

Consultant in Forensic Psychiatry: Norristown State Hospital, Norristown, Pa. 1965 to Present

Participant, Crime Commission of Philadelphia, Research Project on Coordination of Psychotherapy for Criminals, 1966.

Faculty Member: Third Judicial Sentencing Institute for Pennsylvania Judges, Allentown, Pa. December, 1966.

Group Psychotherapist, Sex Offender Research Project, Philadelphia General Hospital, Penna., 1967 to 1972.

Faculty Member: Crime Commission of Philadelphia Forum Presentation: "Treatment of the Mentally Ill Offender", June, 1970.

Moderator: Panel on "Sex Offenders, Abortion and Divorce", Pennsylvania Medical Society, annual meeting, Lancaster, Pa., Sept. 1969.

Consultant in Forensic Psychiatry: Albert V. Cutter Psychiatric Boards Review Course, Buffalo, N.Y., 1967 to Present.

Consultant to Broadside, a community foster home for adolescent boys, Philadelphia, Pa. 1970 to 1973.

Member, Board of Directors and Chairman of Committee on Research and Development of TODAY, Inc., (Treatment for Drugs Among Youth) a residential drug rehabilitation center, Bucks County, Pa. 1970 to Present.

Invited guest lecturer in forensic psychiatry at the following:

Villanova Law School, 1966
State University of New York at Buffalo, 1968
University of Wisconsin, Dept. of Psychiatry, 1969
Rutgers University School of Law, 1969
University of Minnesota School of Medicine, 1970
University of Miami, Dept. of Psychiatry, 1970
University of Miami, Medical-Legal Institute for Attorneys, 1971
The Mayo Clinic, Rochester, Minn. and Rochester State Hospital,
Dartmouth University School of Medicine, Hanover, NH, 1972
University of Missouri, Columbia, 1973
Emory University, Atlanta, Ga., 1973.

Robert L. Sadoff, M.D.

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Presented papers:
American Trial Lawyer's Ass'n,
New York State Trial Lawyer's Assn.
Montgomery County (PA) Trial Lawyer's Assn.
Pennsylvania State Trial Lawyer's Assn.

Professional Affiliations:

American Medical Association
Pennsylvania Medical Society
Montgomery County Medical Society
American Psychiatric Association (Fellow- 1971)
Member: APA Committe on Law & Psychiatry, Task Force on the Right to Treatment, 1974-75.
Pennsylvania Psychiatric Society (Fellow, 1969)
Member: Committee on Professions and Associations, 1972.
Philadelphia Psychiatric Society
American Academy of Psychiatry and the Law (President, 1972-1974)
American College of Legal Medicine (Fellow-1970)
Member, Committee on Legislation, 1972.
American Academy of Forensic Sciences (Fellow, 1972)

Hospital Appointments:

Temple University Hospital	1965-1972
Abington Memorial Hospital	1966-1969
Philadelphia General Hospital	1967 to present
Albert Einstein Hospital, Northern Div.	1971 to present
Norristown State Hospital	1965 to present

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2. "The Physician as an Expert Witness", Sadoff, Robert L., Physician's Panorama, 2:17-18, Sept. 1964.

3. "Group Psychotherapy for Stutterers", Sadoff, Robert L., and Siegel, J:. International J. Group Psychotherapy, 15:72, 1965.

4. "Psychiatric Testimony in Military Courts", Sadoff, Robert L., Collins, D.J., Keeler, Wm. J., Amer. J. Psychiat. 122:1344, 1966.

5. "Experiences with a University-Affiliated Psychiatric Service in a Correctional Institution", Heller, M.S. and Sadoff, Robert L., Corrective Psychiatry and J. of Social Therapy, 12:240, 1966.

6. "Psychiatric View of the Sexual Psychopath Statutes", Sadoff, R.L., Corrective Psychiatry and J. of Social Therapy, 10:242, 1965.

7. "Psychiatry Pleads Guilty", Sadoff, R.L., Amer. Bar Ass'n J., 51:48, 1965.

8. "Military Law", Section X, Part A, and "The Dangerous Offender", Section VI, Part B, Sadoff, Robert L., Insanity Procedures Under Federal Law, edited by Heller, M.S. & Polsky, S., Temple University Unit in Law & Psychiatry Research Series, pp. 121-136 and 324-341, 1965.

9. "The Forensic Psychiatry Clinic: Model for a New Approach", Sadoff, R.L., Heller, M.S., & Polsky, S., Amer. J. Psychiatry, 123:1402,1967.

10. "Crying and Weeping in Emotional and Psychosomatic Disorders", Sadoff, R.L. Psychosomatics, 6:229, 1966.

11. "On the Nature of Crying and Weeping", Sadoff, R.L., Psychiatric Q. 40:490, 1966.

12. "Psychiatric Involvement in the Search for Truth", Sadoff, R.L., Amer. Bar Ass'n J., 52:251, 1966.

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3. "Psychiatric Views of Insanity in Divorce and Annulment", Sadoff, R.L., Pennsylvania Bar Ass'n Q., 37:1, 1966.

4. "Combined Medical and Psychiatric Management of a Patient with Recurrent Myocardial Infarctions and Significant Family History", Sadoff, R.L. and London, A.M., Psychosomatics, 7:218, 1966.

5. "Opportunities for Research in Pennsylvania's Newly Planned Correctional Institution", Heller, M.S., and Sadoff, R.L., The Prison Journal, 46:32, 1966.

16. "Developing Clinical Facilities in Forensic Psychiatry", Heller, M.S., Sadoff, R.L. and Polsky, S., Amer. J. Psychiat., 124:1562, 1968.

17. "Aphasia Due to a Right Hemisphere Tumor in a Right-Handed Man", Sadoff, R.L. and Holmes, J.E., Neurology, 16:392, 1967.

18. "Passive Dependency in Stutterers", Sadoff, R.L. and Collins, D.J., Amer. J. Psychiat., 124:1126, 1967.

19. "Sexually Deviated Offenders", Sadoff, R.L., Temple Law Q. 40:305, Spring, 1967.

20. "Tortious Liability of the Insane: A Psychiatric Evaluation", Sadoff, R.L., Penna. Bar Ass'n Q., 39:73, 1967.

21. "Mental Illness and the Criminal Process: Role of the Psychiatrist", Sadoff, R.L., Amer. Bar Ass'n J., 54:566, 1968.

22. "Mental Illness and Civil Law: Expanding Role of Psychiatric Consultation" Sadoff, R.L., New York Law J., Aug 14-15, 1968.

23. "Who Should Have a Gun: Some Preliminary Psychiatric Thoughts", Rotenberg, L.A., and Sadoff, R.L., Amer. J. Psychiat. 125:841, 1968.

24. "On Changing Group Therapists", Sadoff, R.L., Resnik, H.L.P. & Peters, J.J. Psychiatric Q. Supplement, 42:156, 1968.

25. "On Guns: History, Dynamics and Control", Rotenberg, L.A. and Sadoff, R.L., Corrective Psychiat and J. of Social Therapy, 16:82, 1970.

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36. "Clinical Aspects of Parricide", Sadoff, Robert L., Psychiatric Q., 45:65, 1971.

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38. "Confidentiality in Enforced Group Psychotherapy", Sadoff, R.L., Roether, H.A. and Peters, J.J., Presented at American Psychiatric Ass'n Meetings, Dallas, Texas, 1972. Accepted for publication, Amer. J. Psychi.

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Robert L. Sadoff

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BOOK REVIEWS:

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TAPE RECORDINGS:

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ADDENDUM, 1973 - 1974

1. Presentations Given:

Presentation to the District Attorney's Conference, Media, Pa. November, 1972. Address entitled "When to Call the Psychiatrist".

District Attorney's Conference, Media, Pa., November, 1972 Panel discussion on "Predicting Dangerousness of Offenders"

Montgomery County Trial Lawyer's Association, October, 1972; "The Psychiatrist in Personal Injury Cases".

Pennsylvania Trial Lawyer's Association, January, 1973, "The Psychiatrist's Role in the Evaluation of Tort and Personal Injury Cases".

Sixth Judicial Sentencing Institute, Pennsylvania Crime Commission, January, 1973, Cherry Hill, N.J. "Evaluation and Disposition of Offenders".

American Academy of Forensic Sciences Meeting, Las Vegas, Nevada, February, 1973, "Evaluation of Amnesia in Criminal Situations"

March 15, 1973: Emory University, Atlanta, Georgia. Department of Psychiatry and School of Law, "The Psychiatrist and the Lawyer: Can They Work Together?"

March 16, 1973: Atlanta, Georgia, Conference on Law and Psychiatry (co-sponsored by Psychiatry and Law Committee of the APA and American Academy of Psychiatry and the Law) Respondent to presentation on the Psychiatrist in Personal Injury Cases.

April 12, 1973: Grand Rounds, Reading Hospital, "The Doctor as an Expert Witness".

Sept., 1973: Reading Hospital, Department of Psychiatry, "Sexual Offender and the Law".

May 6, 1973: American College of Legal Medicine, San Francisco, California, "The Psychiatrist and Legislation"

May 6, 1973: American College of Legal Medicine, Panel discussion on legislative applications in medicine.

Robert L. Sadoff, M.D.

Presentations, cont'd.

May 9, 1973: American Psychiatric Association, Honolulu, Hawaii:
"Comprehensive Training in Forensic Psychiatry"

- Moderator: Panel on "Patients' Rights and the Right to Treatment, May 10, 1973.

- Participant: Panel on "Criminal Responsibility and the American Law Institute Model Penal Code", May 8, 1973.

June, 1973: Discussant, "The Right to be Different", by N. Kittrie, American Orthopsychiatric Association Meeting, NYC.

October, 1973: Panel Discussion on "Training in Legal Psychiatry", American Academy of Psychiatry and the Law, Annual Meeting, Pittsburgh, Pa.

March, 1974: "Informed Consent, Confidentiality and Privilege", APA-AAPL Meeting in Phoenix, Arizona.

May, 1974: American Psychiatric Association, Detroit, Michigan
Panel Moderator: "Training in Legal Psychiatry"

October, 1973: University of Missouri: "Criminal Law and Psychiatry"
to be published in Journal of Operational Psychiatry.

September, 1973: (with R. Pakola, M.D.)
"Capital Punishment: A Deterrent for Major Crime?"
Penna. Report of the Governor's Justice Commission on Capital Punishment.

REPORT OF HENRY C. WEINSTEIN, M. D.

115a

HENRY C. WEINSTEIN, M.D.
8 EAST 68TH STREET
NEW YORK, N. Y. 10021
(212) 861-2864

December 23, 1974

Honorable John J. Clyne
County Court
Westchester County, N.Y.

CONFIDENTIAL

Re: Brian Fielding
Indictment No. 26/74

Dear Judge Clyne:

I have been asked to examine and evaluate Mr. Fielding in regard to his sentencing.

I interviewed Mr. Fielding on three separate occasions for a total of approximately three hours. I have also read a number of reports prepared by other psychiatrists including that of Dr. Zales, with whom Mr. Fielding is in psychotherapy. The latter report, along with my own interviews have permitted to assess not only Mr. Fielding's psychiatric status but also both his progress in psychotherapy and his potential for rehabilitation.

At the onset I would like to mention my work in the area of forensic psychiatry (I have attached hereto a brief curriculum vitae). In addition to being a psychiatrist, I am also a lawyer. I am on the faculties of both the N.Y.U. Medical School and the N.Y.U. Law School and am the Director of the Forensic Psychiatry Services at the Bellevue Hospital Center. As such, I am in charge of the Psychiatric Prison Ward. In the course of my years at this facility, I have had the opportunity to evaluate, literally, thousands of defendants referred by the courts of the First Department. (The number of defendants admitted to this facility annually is approximately 1,500).

As I mentioned above, in preparing this letter I had the opportunity not only to interview the defendant, but also to

read the reports prepared by other doctors including Drs. Zales, Bellak, Gaylin and Bieber. We are all, by and large, in agreement and have arrived at the same conclusions independently in regard to the etiology of Brian's sexual disorder, the severity and uncontrolability of the impulses under which he was laboring as well as his progress in psychotherapy. So I shall not therefore, repeat here our assessment of Brian's personality and character and our understanding of the underlying dynamics of his psychopathology.

Before I add my personal comments, I want to note that I share with Dr. Bellak a strict view of and grave concern with those aspects of the criminal justice system which relate to the protection of the community. As you might expect, my constant contact with defendants that I examine has lead me to become acutely aware of the urgent need for society to protect itself by the incarceration of dangerous and/or violent habitual criminals. Unfortunately, I have also learned that the opportunities for rehabilitation or psychiatric treatment in our prisons are minimal.

I shall not belabor these points. They have been too well stated by others. Rather, I would like to describe to you the outcome of a case very similar to the one at hand. (In the interests of confidentiality I shall omit his full name). Mr. Lewis V. was a 30 year old school teacher at the time of his arrest. He was found guilty of sodomy in the first degree with two ten year old boys. These boys were students in his class. It is interesting to note he had very much helped these boys, not only with their work in school, but with their adjustments in general. He too was very close to the members of their families who welcomed him into their homes and were grateful to him for his efforts on behalf of their sons. He was like a member of these families. Furthermore, it was clear that he had identified with these boys and had tried to give them everything he felt he had lacked in the past from his father: concern, guidance, etc.

I was asked to examine Lewis and report to the judge my findings as to his psychiatric status as well as the prognosis in regard to rehabilitation. In my report to the judge, on the basis of the facts as I saw them, I urged that Lewis not be sentenced to jail. He was sentenced to five years probation, and I began intensive psychotherapy with him. He did very well. Of course, he had lost his job with the Board of Education. But he did obtain another job and succeeded very well at it. He has continued to do so well that I was

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recently informed by the Department of Probation that because of his exemplary progress they are discharging him before the end of his sentence.

It is truly remarkable how similar in background Lewis V. is to Brian Fielding. Not only was the family structure similar but Lewis also had an older brother who was a very successful physician. Like Brian, Lewis gravitated toward work with young boys. In Lewis's case it was grad school teaching; in Brian's case it was athletics. And, in both cases, in all other respects their lives were beyond reproach and their records impeccable.

These men are not typical criminals, nor were typical criminal acts involved. They were, in a manner of speaking, possessed, their judgments and reality testing were markedly impaired, and the impulses that they struggled with were tragically beyond their control.

Like Brian, my patient Lewis had always been uncomfortable with his circumstances. In both cases, they were highly motivated to change their lives, and hoped they could lead normal lives. Indeed, they did not <u>will</u> to be afflicted with their mental disorders, and in both cases their situations were fraught with constant tension and anxiety. They were both always frightened and never happy with their deepest feelings. Both had sought help <u>before</u> they got into trouble with the law. In a sense, Society, or at least Psychiatry, failed <u>them</u>.

Finally, like Brian, the manner in which Lewis behaved indicated a strong wish to be caught. Such behavior belies a very <u>harsh</u> conscience, rather than the absense of one. His wish to be caught is, or course, a plea for help, but at the same time all that was valuable to him has been lost. And yet, this man need not be lost to society. As I said, Lewis is now functioning in the community. And the same is possible for Brian if these next crucial months and years permit it.

In my opinion, the prognosis for Brian's complete recovery is very high. Under the present circumstances, there is virtually no chance that he would be involved again in behavior dangerous to the community.

Brian realizes now the magnitude and enormity or what he was involved with. Indeed, he becomes extremely agitated, upset, guilty and depressed when discussing it. It is now clear to him how at that time his judgment was overcome by the strength of his impulses which became irresistable.

On the other hand, I was impressed by the fact that he

is not wallowing in self-pity, as I have seen others do, but rather, despite his tears, he sort of sets his jaw and puts his faith in his family, his friends, and his doctor to help him overcome the confused disordered and troubled part of him. He wishes his psychotherapy were proceeding more rapidly. He hopes someday to marry and have children. But his continued progress requires continued intensive psychotherapy with Dr. Zales. In addition, his continued progress at this point requires a heterosexual environment. For these reasons I would strongly urge that Brian not be sentenced to jail.

In this regard, I am also concerned that incarceration in a jail would constitute a real and present danger to Brian's physician as well as mental well being. Having direct medical responsibility for a prison, I am very much aware of the physical dangers to a defendant such as Brian. The dangers of assaults and sexual attacks by the worst elements-the truly psychopathic criminals- are ever present. The effects on Brian would be devastating. Not only would any progress be halted, but the chances, under those circumstances, are good that he would regress, perhaps become fixed in a homosexual orientation, and further might very well become more depressed and suicidal. I myself have seen a number of cases such as this. (Suicide in prison is a subject with which I am quite familiar. As Director of the New York University Center of Forensic Psychiatry, I prepared a symposium late last year on this subject, and I enclosed the brochure for the symposium).

Although my primary diagnostic impression of Brian is pedophilia, there is a substantial element of depression, and he must be observed very carefully in this regard.

For all the reasons I have cited, I do hope that you will sentence Brian to a period of probation rather than incarceration.

Sincerely,

Henry C. Weinstein,M.D.

DR. [illegible] Consultant, New York [illegible] Associate in Psychiatry, [illegible] Physicians & Surgeons, Columbia University; [illegible] Psychoanalytic Clinic for Training, Columbia University.

PROFESSOR GERHARD O. W. MUELLER, Professor of Law, Director of The Criminal Law Education and Research Center, New York University, School of Law.

DR. FRANK L. RUNDLE, Director of Psychiatry, Prison Mental Health Services, Department of Psychiatry, Department of Correction, City of New York.

DR. DANIEL M. SCHWARTZ, Director, Forensic Psychiatry Services, Kings County Hospital Center; Associate Professor of Psychiatry, State University of New York, Downstate Medical Center.

DR. HANS TOCH, Professor of Psychology, School of Criminal Justice, State University of New York at Albany.

KATHLEEN [illegible] R.N., Coordinator, In-Service Education and Training, Mental Health Services, Department of Psychiatry, Department of Correction, City of New York.

PROFESSOR SAMUEL [illegible] Visiting Associate Professor of Sociology, Department of Sociology, New York University.

DR. HENRY C. WEINSTEIN, Director, Center of Forensic Psychiatry; Director, Forensic Psychiatry Services, Bellevue Hospital Center; Assistant Professor of Psychiatry, New York University School of Medicine; Adjunct Associate Professor of Law, New York University School of Law.

MR. ROBERT J. WICKS, Training Consultant for Curriculum Development, Center for Correctional Training, Department of Correction, City of New York; Adjunct Assistant Professor, St. Vincent's College, St. Johns University.

DR. ARTHUR ZITRIN, Professor of Psychiatry, New York University School of Medicine, Formerly Director of Psychiatry, Bellevue Hospital Center.

CENTER OF FORENSIC PSYCHIATRY
Institute of Forensic Medicine
New York University
520 First Avenue
New York, N. Y. 10016

THE CENTER OF FORENSIC PSYCHIATR
OF THE INSTITUTE OF FORENSIC MEDICINE
NEW YORK UNIVERSITY

THE DEPARTMENT OF CORRECTION
OF THE CITY OF NEW YORK

THE BOARD OF CORRECTION
OF THE CITY OF NEW YORK

Present a Symposium

"SUICIDE IN PRISON"

Friday, November 2, 1973

9:30 a.m. to 5:00 p.m.

at

New York University Medical Center

Medical Science Building

550 First Avenue

New York City

4618

1192

SUICIDE IN PRISON

A SYMPOSIUM

MORNING PROGRAM

Symposium Chairman ..... Dr. Milton Helpern

Introduction ..... Commissioner Benjamin J. Malcolm

Session Chairman ..... Dr. Arthur Zitrin

Institutionalization and Self-Destructiveness

Presentor ..... Dean Robert B. McKay

Discussant ..... Dr. Edward Kaufman

Discussant ..... Professor Samuel Wallace

Floor Discussion

Suicide In Prison: Psychological Autopsies

Presentor ..... Mr. John Gibbs

Discussant ..... Dr. Hans Toch

Discussant ..... Dr. Frank Rundle

Discussant ..... Dr. Robert L. Goldstein

Floor Discussion

AFTERNOON PROGRAM

Session Chairman ..... Professor Gerhard O. W. Mueller

Suicide In Prison: Some Recent Lessons

Presentor ..... Dr. Leonard Moss

Discussant ..... Mr. Robert J. Wicks

Discussant ..... Dr. Daniel W. Schwartz

Discussant ..... Mr. Jack Birnbaum

Floor Discussion

Innovative Suicide Prevention

Presentor ..... Dr. Bruce Danto

Discussant ..... Mr. John Brickman

Discussant ..... Kathleen Wagner, R.N.

Discussant ..... Dr. Henry C. Weinstein

Floor Discussion

DEPUTY COMMISSIONER JACK BIRNBAUM, Department of Correction, City of New York.

MR. JOHN BRICKMAN, Executive Director, Board of Correction, City of New York.

DR. BRUCE DANTO, Director, Suicide Prevention and Drug Information Center, Detroit Psychiatric Institute; Associate Professor, Department of Psychiatry, Wayne State University, School of Medicine.

MR. JOHN GIBBS, Research and Teaching Assistant, School of Criminal Justice, State University of New York at Albany.

DR. ROBERT L. GOLDSTEIN, Medical Director, Forensic Psychiatry Clinic, Manhattan Criminal and Supreme Courts; Director of Psychiatry, Beekman Downtown Hospital; Clinical Instructor in Psychiatry, New York University School of Medicine.

DR. MILTON HELPERN, Chief Medical Examiner of the City of New York; Director of the Institute of Forensic Medicine; Professor and Chairman, Department of Forensic Medicine, New York University School of Medicine.

DR. EDWARD KAUFMAN, Formerly Director of Psychiatry, Prison Mental Health Service, Department of Psychiatry, Department of Correction; Chairman, Committee on Prisons, New York District Branch, American Psychiatric Association; Chief Psychiatrist, Lower Eastside Service Center.

THE HONORABLE BENJAMIN J. MALCOLM, Commissioner, Department of Correction, The City of New York; Adjunct Professor of Correctional Administration, John Jay College of Criminal Justice.

DEAN ROBERT B. McKAY, Chairman, Board of Correction, City of New York; Dean, New York University School of Law; Chairman, New York State Special Commission on Attica.

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CURRICULUM VITAE

HENRY C. WEINSTEIN, M. D.

Date of Birth: May 3, 1934

Birthplace: New York, New York

Marital Status: Married, two children

Citizenship: United States

COLLEGE:

Columbia College
New York, New York — A.B. 1955

LAW SCHOOL:

Columbia University
New York, New York — LL.B. 1958; LL.M. 1959

ADMISSION TO THE BAR:

New York State — 1958

U. S. Supreme Court — 1959

MILITARY SERVICE:

U. S. Army, Active Duty and Reserve — 1959-1965

EMPLOYMENT, LEGAL:

U. S. Atomic Energy Commission
New York Operations Office
New York, New York — 1960-1961

Callahan and Weitzel
37 Wall Street
New York, New York — 1960-

CURRICULUM VITAE

HENRY C. WEINSTEIN, M. D.

MEDICAL SCHOOL:

New York University
New York, New York — M.D. 1965

INTERNSHIP:

Montefiore Hospital
Bronx, New York
(Mixed Medicine) — 1965-1966

NATIONAL BOARDS: — 1966

M.D. LICENSURE:

New York State — 1966

RESIDENCY:

Albert Einstein College of Medicine
Bronx, New York
Residency in Psychiatry — 1966-1969

(Chief Resident — 1968-1969)

POST-RESIDENCY TRAINING:

New York University School of Medicine
New York, New York
Fellow in Psychiatry — 1969-1971

New York Psychoanalytic Institute
New York, New York
Candidate — 1970-

EMPLOYMENT, MEDICAL:

New York University Medical Center
(Bellevue Hospital Center)
New York, New York

Forensic Psychiatry Services
Staff Psychiatrist 1971-1972
Director 1972-

ACADEMIC POSITIONS:

Albert Einstein College of Medicine
Bronx, New York
Assistant Lecturer in Psychiatry 1968-1969

New York University School of Medicine
New York, New York
Teaching Assistant 1969-1970
Clinical Instructor 1970-1971
Assistant Professor of Psychiatry 1971-

New York University School of Law
New York, New York
Adjunct Assistant Professor of Law 1971-

Letter from Anne Vitale to Honorable John J. Clyne, Dated December 14, 1974, Submitted in Support of Petition for Writ of Habeas Corpus

105 Rockland Avenue
Mamaroneck, N.Y. 10543

December 14, 1974

Honorable John J. Clyne
Justice of the State of New York

Dear Judge Clyne,

Words are inadequate to describe any relationship. How do I begin to write about the one person I love so much?

You do not know me - you do not know Brian. Yet, I ask you to listen and to try to understand who we are - For the decision which you will render with regard to sentencing Brian, will have a profound effect upon the rest of our lives.

Throughout my life - I am 27 years old - I have always tried to be true to the ideals which have been given to me as my heritage. My parents are simple people who have given me the love that every child should be privileged to experience and the beliefs in my God and in my

country. I have been educated in the Catholic Tradition: 8 years in Catholic grammar school - 4 years in Catholic high school - a B.A. degree in Theology from Fordham University and a M.A. degree in Religious Education from Boston College.

For six years, I have taught Religion in a Catholic grammar school, in a Catholic high school, in Adult Education Programs. I have been active in initiating and developing a Parish Religious Education Program in Mamaroneck and in expanding this program to the Larchmont-Mamaroneck Community. I have actively served on the Archdiocese of New York Religious Education Committee and I have been a participant in the Project of the Religious Education Association of the U.S. and Canada: "Design for the Future of Religious Education."

Religion is part of my life. I am committed to the person it offers to humanity. I am committed to the understanding it tries to promote among

all people.

I believe very strongly in God who is active in the center of our existence, who works in and through people to promote life, love, understanding, forgiveness, and peace.

I believe in Jesus who taught us how to live so that life can have meaning - to love even our enemies - to give of ourselves to those who need us - to forgive those who have wronged us - to work toward the fulfillment of justice, understanding and peace.

I believe in man and in man's capacity for good. I believe there is a power within man, a spirit, an intellect, a soul, an ego - which enables man to think, to choose, to love. I believe in man's possibilities to create an order in the universe which will [illegible] of man's individual and of society in mutual

understanding, respect and hope for the future.

I am an idealist but I am dedicated to work so that these ideals might become a reality.

Each of us reaches out to another who might share our hopes and fears, our dreams and doubts — our lives. For me, Brian is that person. Though we come from different backgrounds, we share that which is deepest in each of us.

Brian and I met four years ago when we both worked at St. Vito School in Mamaroneck. As casual acquaintances, as professional colleagues, as friends, we discovered much about each other.

Brian — the warm smile - the gift of giving — the easy laughter - the helping hand - the sincere concern - the honest appraisal - always so [illegible] - [illegible] - [illegible] - [illegible] this openness extended to all he knew —

in the parish and in the community. It was little wonder that I came to admire and respect him. Brian was constantly serving others - he refused no one. There are many who now have chosen to forget this fact. And this is one of the tragedies of the community. How quickly all the "so-called friends" disappear - how suddenly all Brian's past achievements on behalf of the community, the Church, the families are minimalized so as to appear non-existent. The lesson of charity has not been learned by Manaroneak - I pray that your court may exhibit the understanding of this word.

Brian is not perfect - he has made mistakes but never has he been vindictive - never has his intent been [illegible] respect for life - a concern for others,

a desire to do whatever he can to help. a vision that extends beyond today, beyond the immediate community.

Brian wanted to continue in his family's business interests and to coach college football. His hope was that his profession would allow him the means of enabling him to be active in working for the benefit of his local communities.

I worked with Brian - I saw Brian socially - I grew to know him and our relationship developed. We dated; we met each others families and friends; we shared each others lives; we fell in love. And it remains this way today.

Fourteen months ago, our lives were shattered by Brian's arrest. The world seems to stand still at times like this. I re-examined my thoughts and feelings. If would have been [illegible] for me not to have done [illegible], or

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at any time during this year, except for the fact that we love each other. And as long as our love is a reality, there remains a possibility for our future together.

We have weathered these fourteen months, indeed, we have become closer to each other. We have shared the initial shock, the anguish, the interminable waiting, the rejection by others, the struggling to rebuild your life.

In fourteen months, the pressures of the legal situation have been constant. Yet Brian was free on bail. Bail enabled Brian to receive psychiatric therapy — to rehabilitate his life. He has been evaluated by numerous psychiatrists who emphasize that Brian is not a danger to society, that society does not need to be protected from him, and that incarceration would be totally

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destructive. Instead, I realized the devastating effects of imprisonment during Brian's remand to jail subsequent to the trial. It is impossible to describe the suffering during those days - for Brian's mother and father and brother, for his friends, for myself, but most of all, for Brian. I know that justice does not seek to destroy life and Brian would be destroyed by jail.

I have faced the reality of the total deprivation of our penal institutions - it is a horror to me that these conditions exist, that we imprison first offenders, that we imprison people with psychological problems, that we imprison for the sake of vengence - all without hope and consideration for rehabilitation.

What can be gained by so imprisoning Brian? Nothing and much is to be lost - the life of one

man who has contributed much to society, the life of one man who has done so much good in the fourteen months of bail, the life of one man who is intensely trying to make his life meaningful.

Jail would destroy this life while a probationary sentence would allow for Brian to continue psychotherapy and to live a life worthwhile to society and to himself.

Surely you can understand. I know that it is within your power to grant a probationary sentence. Other courts have done so in similar convictions. They too have realized the gravity of the situation yet they have understood that the concept of justice involves mercy, that society, in order to survive, can not be served when a human

life is rehabilitated, that a jail sentence would be counter productive.

I am asking you then, to give Brian a probationary sentence. I am asking this for Brian, for myself but also so that justice might be served.

Sincerely,

Anne T. Vitale

MICHAEL R. ZALES, M.D., P.C.
EDGEWOOD DRIVE
GREENWICH, CONNECTICUT 06830

AREA CODE 203
TELEPHONE 869-7269

134 a

May 31, 1976

Mr. Jack Auspitz
Paul, Weiss, Goldberg,
Rifkind, Wharton, & Garrison
345 Park Avenue
New York, N. Y. 10022

Dear Mr. Auspitz:

Mr. Brian Fielding has been involved in an intensive psychotherapy with me on a three-to-five times per week basis since October, 1973. Pedophilic impulses have been supplanted by a genuine desire to join heterosexual society. He is no longer a Pedophile. He poses absolutely no threat to society.

Treatment over the past six months, during which time he has been confined pursuant to Court order, has been concerned with his depression and anxiety at the threat of incarceration, his guilt and remorse at past activities, and his grief at the deterioration of his mother's health directly attributable to his legal difficulties.

Mr. Fielding is now emotionally prepared to take his place in society. Interruption of a treatment directed toward facilitating his social adjustment plus the deleterious effects of confinement in a penal institution would only destroy this hard-won victory from mental illness.

Sincerely Yours,

Michael R. Zales

Michael R. Zales, M.D.
Psychiatrist

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ROFESSIONAL PERSONNEL ONLY.
OT TO BE PLACED AT THE
ISPOSAL OF ANY OTHER PERSON.

MRZ:bk

AFFIDAVIT OF VINCENT W. LANNA IN SUPPORT OF MOTION.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

- -X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment
74-00026-01

BRIAN S. FIELDING,

Defendant.

- -X

STATE OF NEW YORK]
] ss
COUNTY OF WESTCHESTER]

VINCENT W. LANNA, being duly sworn, deposes and says:

1. That he is one of the attorneys and trial counsel in connection with the above named defendant relative to this Indictment.

2. This Indictment was handed up by the Westchester County Grand Jury and the defendant was arraigned in March of 1974 and charged with the following:

(1) Seven separate counts of sodomy second degree;

(2) Twenty-four separate counts of sexual abuse in the second degree;

(3) Seven separate counts of sexual misconduct;

(4) Fourteen separate counts of endangering the welfare of a child.

3. The defendant entered pleas of not guilty to each and every count of said Indictment and then instituted appropriate motions pursuant to the rules of the Court.

The last of the defendant's motions was decided by a decision of that Court dated October 8, 1974.

AFFIDAVIT OF VINCENT W. LANNA IN SUPPORT OF MOTION

4. On the 10th day of October, 1974, the People served upon your deponent copy of an Order to Show Cause returnable on the 15th day of October (a copy of which is attached hereto and made a part hereof and marked as Exhibit "A"), which sought a preference in this criminal trial. Coming as a complete surprise to your deponent, an answer was submitted (a copy of which is attached hereto, made a part hereof and marked Exhibit "B") resisting said application.

5. Thereafter, and on the 15th day of October, 1974, your deponent when appearing for the return of said motion for a preference, before the Honorable James Caruso, the Administrative County Court Judge of this County, was advised on the record that the Honorable John J. Clyne, County Judge of Albany County had been appointed by the Appellate Division of this Department on October 9, 1974, to preside relative to this Indictment. In fact, Judge Caruso designated a Part VI of that Court for that very reason.

6. Prior to Judge Clyne taking the bench on the morning of October 15, 1974, your deponent sat with Judge Clyne, Judge Caruso, William Fredericks, Esq., the Assistant District Attorney assigned to this case, in the robing room and certain conversations were had relative to this case. These conversations were off the record, and in substance revealed to your deponent the appointment of Judge Clyne, the fact that Judge Clyne had examined the motion papers and answering affidavit relative to the preference application and was inclined to deny same. Nevertheless, Judge Clyne told your deponent that he (Judge Clyne) was prepared to proceed

AFFIDAVIT OF VINCENT W. LANNA IN SUPPORT OF MOTION

to trial on October 22, 1974. Your deponent in the presence of both Judge Caruso and Judge Clyne, informed the Court that in effect a preference was being granted and that your deponent who is a Colonel in both the United States Army Reserve and the National Guard of the United States, State of New York, is actually under orders to report for a period of active duty on November 3, 1974 to Fort Knox, Kentucky. This period of attendance was to conclude on the 8th day of November, 1974. The application for said active duty attendance was made in July of 1974, and a copy of said orders, dated August 20, 1974 are attached hereto, made a part hereof and marked as Exhibit "C".

The attendance at this military school is extremely important to your deponent for the reason that an officer in the military must maintain his proficiency on a yearly basis so as to be retained by the yearly retention examination board.

In addition, your deponent advised the Court that some time ago he had a case marked in the District Court for the Southern District of New York, (US v. Louis Zaicek, 74 Cr. 803) for a day certain, the trial to commence before the Honorable Charles M. Metzner, a District Judge of that District, on November 13, 1974. Said trial date was fixed by Judge Metzner, taking into consideration your deponent's otherwise active duty commitment as well an his active trial practice in the County of Westchester.

Judge Clyne, curtly and rudely informed your deponent that he would honor neither commitment and that this trial would proceed on October 28th.

7. Thereafter, Judge Clyne took the bench, and on the record followed substantially the same procedure as had already been discussed. A transcript of said proceeding is attached hereto, made a part hereof, and marked as Exhibit "D".

8. Following the discourse on the record, your deponent along with the Assistant District Attorney and Judge Clyne retired to the robing room (however, without Judge Caruso on this occasion) at which time your deponent made inquiry of Judge Clyne as to why he had been selected to sit on this Indictment. This inquiry was also made of Mr. Fredericks, the Assistant District Attorney who was present. Both replied that they were unaware as to the reasons therefor.

At about this point, Judge Clyne made inquiry as to whether or not there could be any disposition by way of plea negotiations. The Assistant District Attorney, Mr. Fredericks, indicated that he was not certain, but he would arrange to discuss this with his superiors and get back any such information to Judge Clyne. At that same time, Judge Clyne informed your deponent, that even if there were a disposition by way of plea negotiations, that the defendant herein would be incarcerated. Judge Clyne also inform ed your deponent, that should any plea negotiation be rejected, and that the defendant go to trial and be found guilty, that the sentence might be more severe.

It is incomprehensible to your deponent how a Judge could have arrived at such a conclusion relative to incarceration, without being familiar with the factual posture, the background of a defendant, and without the requirements of a pre-sentence report.

Your deponent did indicate to the Court that he would seek to have other counsel handle this case because he found it extremely difficult to set aside both his military commitment and his Federal trial commitment.

9. Thereafter, and on the 18th day of October, 1974, your deponent received a letter, a copy of which was sent to Judge Clyne, from the Honorable Joseph F. Gagliardi who is the Administrative Judge of the Ninth Judicial District, which correspondence gave the reason for the appointment of Judge Clyne. A copy of that letter is attached hereto, made a part hereof and marked as Exhibit "E".

The contents of that correspondence, although sad, was rather surprising to your deponent, for obviously whomever the grandson of Judge Gagliardi is, he does not have the same surname and your deponent finds himself in more of a dilemma than he was prior to such revelation.

Following the receipt of this letter, your deponent made arrangements to visit with Judge Gagliardi, who as this Court knows is the Administrative Judge of this District, on October 22nd, 1974. Although Judge Gagliardi received your deponent most cordially, and in fact had acknowledged said appointment, it was Judge Gagliardi's opinion that in view of his personal involvement that he was not at liberty to inject himself in this case and would not discuss said matter from any standpoint, adjournment, disqualification of Judge Clyne or otherwise. It was Judge Gagliardi's direction that your deponent make application directly to this Court.

AFFIDAVIT OF VINCENT W[illegible]ENNA IN SUPPORT OF MOTION

JudgeCaruso, the Administrative Judge of the County Court of Westchester, has taken the same position.

As a result, your deponent has instituted these proceedings.

10. Your deponent has spoken with the defendant relative to another trial attorney being substituted, but the defendant is extremely opposed to such a procedure. In addition and in complete candor, it would be virtually impossible for new trial counsel to be prepared within a matter of a week to ten days in a case quite as complex as the present Indictment. For these reasons as well as the fact that your deponent could be available at some time after November 18th, 1974, it appears arbitrary and capricious of Judge Clyne not to have honored both the military and Federal Court commitment of your deponent.

In addition, this is a relatively new Indictment and no reasons have been advanced on or off the record, as to why said case must move on October 28th and no other date. Certainly, Judge Clyne left your deponent with the impression that he was being most arbitrary.

Your deponent is extremely selectful as to his active duty military tours and the same are not easily changed or canceled except in the most urgent and extreme situations. In fact, your deponent utilizes what others might deem as vacation time to participate in these military tours. Also, it does not seem fair that where Judge Metzner, theDistrict Judge fixed a trial date out of consideration for your deponent's busy trial calendar in

Westchester, that Judge Clyne should just arbitrarily ignore a prior fixed engagement.

11. At this juncture we feel this Court should take cognizance of the fact that this case involves a defendant who is on bail and not incarcerated. The action of giving this case a preference for trial will advance it ahead of hundreds of older cases, many of which involve defendants who are in jail. We respectfully submit that the action taken herein could be misinterpreted as being precipitated by virtue of the fact that one of the victims has an influential grandfather, and, therefore, should be given preferential treatment. We are sure that this is not the impression which was intended but we think the Court will agree that this could very well be inferred by other litigants who do not have the same relationships as one of the victims in this case.

For this reason too, we urge that this case be handled in the regular course of business and without resort to an out of County Judge.

12. In addition, and in view of the remarks of Judge Clyne relative to absolute incarceration while in the robing room, and now in view of Judge Gagliardi's letter, a copy of which was sent to Judge Clyne, it is the further application of your deponent that Judge Clyne be disqualified from acting in this case.

An application for disqualification was made to Judge Clyne by telephoning his chambers in the County Courthouse, City of Albany, however, Judge Clyne refused to disqualify himself and so told your deponent.

AFFIDAVIT OF VINCENT W. LANNA IN SUPPORT OF MOTION

In examining Judge Gagliardi's letter and the reasons for the assignment of a Judge from outside the District, it certainly would have appeared the wiser course not to have revealed to the newly assigned Jurist the reasons therefor. Indeed, it would appear extremely difficult, if not impossible, for a brother Jurist to divorce his personal feelings in a crime the nature of which this Indictment recites, where he is aware of said relationship. This, coupled with Judge Clyne's absolute mandate of incarceration, without following any of the required guidelines relative to sentencing, impells your deponent, in the interests of justice, in fairness to the defendant, to request that Judge Clyne be disqualified from acting in this Indictment.

No prior application for this relief has been requested.

Vincent W. Lanna

VINCENT W. LANNA

Sworn to before me this
23rd day of October, 1974

Mariann J. Parks

MARIANN J. PARKS
NOTARY PUBLIC, State of New York
No. 60-3021150
Appointed in Westchester County
Commission Expires March 30, 19 75

AFFIDAVIT OF ANNE VITALE REGARDING MEETING WITH SENTENCING JUDGE JOHN R. CLYNE.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND DEPARTMENT

----------x

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

AFFIDAVIT

-against-

BRIAN FIELDING,

Defendant-
Appellant.

----------x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANNE VITALE, being duly sworn, deposes and says:

1. I am a friend of defendant-appellant, Brian Fielding and am making this affidavit to describe a meeting which took place between me and Judge John J. Clyne on December 30, 1974.

2. I have been a close friend of the defendant-appellant Brian Fielding for several years. When Brian informed me that he was to be sentenced on January 2, 1975 in the County Court, Westchester County, I wrote a letter to the sentencing judge, Judge John J. Clyne, requesting leniency. Sometime in December 1974, I was informed that Judge Clyne wished to meet with me. The meeting was arranged for December 30, 1974 and lasted for more than an hour and a half. It took place in the chambers of Judge Clyne in Albany, New York.

BEST COPY AVAILABLE

AFFIDAVIT OF ANNE VITALE REGARDING MEETING WITH SENTENCING JUDGE JOHN R. CLYNE

3. My conversation with Judge Clyne rambled over many matters including my own background, my relationship with Brian, my philosophy of sentencing, etc. I will limit this affidavit to only a few of the matters discussed.

4. I asked Judge Clyne why he had sent for me. He said that I had been mentioned in Brian's letter to him and in other letters as well as the probation report, and that he was impressed with my letter to him.

5. I pleaded with Judge Clyne not to sentence Brian to jail. I said that jail would have a detrimental effect on Brian. I asked Judge Clyne if he had read the psychiatric reports which indicated the detrimental effect that jail would have. Judge Clyne said that he had read the reports and that he had gone over all of the jargon that the psychiatrists had used. I said that it was not jargon and that I knew that the psychiatrists were stating the truth. Judge Clyne said that there was a time before psychiatry that we condemned the criminal along with the act. That the world would be better off if we continued to do this.

6. Judge Clyne asked if he didn't send Brian to jail, how would he deal someone who could not afford all of the psychiatric evaluation and therapy which Brian had received. I said that they should be given the same opportunity. Judge Cly said that if it were I who were convicted, I would be in jail right now because I could not afford all the legal and psychiatr fees.

BEST COPY AVAILABLE

AFFIDAVIT OF ANNE VITALE REGARDING MEETING WITH SENTENCING JUDGE JOHN R. CLYNE

7. I said to Judge Clyne that in this case the law does not require a maximum jail sentence--that probation is allowed. Judge Clyne said that he could not grant probation. I asked why not. He said that a sentence of probation would mean that he was condoning the crime. Judge Clyne read the statutes to me. I said that these statutes do not require jail sentences. That therapy would bring on rehabilitation. Judge Clyne said that sex offenders were the most difficult to rehabilitate. I asked if Brian could receive therapy in prison. Judge Clyne said he did not know. I asked him if he knew how important therapy was for Brian. He said he did not think it was important.

8. I told Judge Clyne that he was ignoring the psychiatric reports which indicated possible self-destructive tendencies if Brian were sent to jail. I said that I had seen Brian during the 10 days he spent in jail after the trial and that I saw the horror and pain that Brian was suffering and I knew that suicide was a possibility. Judge Clyne said that maybe it would be for the best.

9. Judge Clyne repeatedly asked what the community would say if he did not sentence Brian to jail. He asked what the bus driver would say. I said that I knew the community and that they did not want to see Brian in jail. I asked Judge Clyne if he had read the letters from the people in the community.

10. Judge Clyne and I talked about many other things which are not included in this affidavit.

Anne Vitale

Sworn to before me

this 12 day of June, 1975.

John E. L. Moulton

B5

Answer (Judge Clyne).

NEW YORK SUPREME COURT
APPELLATE DIVSION : SECOND DEPT.

[SAME TITLE]

AFFIDAVIT

JOHN J. CLYNE, being duly sworn, deposes and says:

1. That he is County Court Judge of the County of Albany and has been assigned by Order of the Appellate Division, Second Department to the County of Westchester to hear and determine the matter of the People against Brian Fielding.

2. This affidavit is submitted in answer to the affidavit of Vincent W. Lanna, attorney for the defendant Brian Fielding, in support of an application for an order directing your deponent to disqualify himself from presiding at the trial of the said Brian Fielding.

3. I made arrangements to meet with counsel representing the people and the defendant in that case on October 15, 1974. Before calling the case there was a discussion in Judge Caruso's office with the attorneys concerning the matter. During that discussion I indicated to the attorneys for the respective parties that in view of the order of the Appellate Division, Second Department assigning me to the case it was my intention to proceed to trial on October 28, 1974. Mr. Lanna voiced objection to this proposal and indicated that he was committed to a case in Federal Court on either November 3rd or November 4th, and further that he had a National Guard commitment at Fort Knox for November 3, 1974, although that was not

his principal reason for not wanting to proceed to trial on October 28, 1974. I took the position that if he was actively engaged in trial at such time as the federal case were to be reached the federal case would have to await the conclusion of the criminal trial in Westchester County. At no time in our conversation did I raise my voice, make any off-color remarks, nor in any way berate or downgrade Mr. Lanna's request. I simply stated firmly and succinctly that it was my intention to commence the selection of the jury in this case on October 28, 1974. No more, no less. My reason for selecting the date October 28, 1974 was based upon the fact that it would best fit into my calendar situation in Albany County and result in a minimal loss of jury trial time in my own county.

4. Following the appearance in open Court, which appears as Exhibit "D" on this application, the Assistant District Attorney, representing the people, together with Mr. Lanna and myself, returned to Judge Caruso's office, at which time I inquired of the attorneys whether or not they had explored the possibilities of a plea in this case. The Assistant District Attorney indicated that he would have to discuss the matter with his superiors, and I called the Honorable Carl Vergari, the District Attorney of Westchester County and indicated to him that it would be appreciated if his office could make known their position to Mr. Lanna as quickly as possible. At the same time I indicated to Mr. Lanna that he should take into consideration in the plea bargaining discussions that it was the present intention of the Court to incarcerate the defendant in the event that he should enter a plea of guilty to one or more of the felony charges and that this Court would not entertain any motion to reduce below one or more felony charges.

I know of no way that there can be meaningful plea bargaining negotiations without the Court giving the parties an indication of the potential sentence should there be an

agreement as to the plea. (See People v. Selikoff, Ct. of App. October, 1974).

5. The first I knew that one of Judge Gagliardi's grandsons was a complaining witness in this case was upon receipt of his letter of October 17, 1974, Exhibit "E" on this application. To this date I have no idea which one of the complaining witnesses is the Judge's grandson. I had never met Judge Gagliardi prior to my assignment to Westchester County, and in any event the contents of the letter would in no way influence my conduct of the trial of this case or of any decisions arising therein nor do I feel that I am in any way prejudiced or bias in this matter.

For the reasons stated herein I advised Mr. Lanna that I would not disqualify myself in this case.

(Sworn to by John J. Clyne, October 29, 1974.)

B1

SUPPLEMENTAL APPENDIX

Article 78 Proceeding.

Answer (District Attorney).

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of the Application of
BRIAN FIELDING,

Petitioner,

For a Judgment Under Article 78,
CPLR in the Nature of Mandamus

against

JOHN J. CLYNE, County Court Judge, The Several Judges of the County Court, Westchester County, and the District Attorney of Westchester County,

Respondents.

B. ANTHONY MOROSCO, being duly sworn, deposes and says that he is an Administrative Assistant District Attorney of Westchester County and submits this affidavit on behalf of the District Attorney in answer to the Petitioner's request for a Judgment under Article 78 of the C.P.L.R. in the nature of mandamus. This affidavit is made upon information and belief, the source of which are the file of this matter maintained by the office of the District Attorney.

By Indictment No. 74-00026, the defendant petitioner was charged with the crimes of Sodomy in the Second Degree (seven counts), Sexual Abuse in the Second Degree (twenty-four counts), Sexual Misconduct (seven counts) and Endangering the Welfare of a Child (fourteen counts).

B2

On October 10, 1974, some seven months after the defendant petitioner had been arraigned on indictment 74-00026, and two days after the last of three pretrial motions brought by the defendant petitioner had been decided, the People moved for an order of the County Court granting a preference and directing an immediate trial of said indictment. While the reasons why the People sought this relief are more fully set forth in their affidavit in support of the order to show cause (which is attached to petitioner's moving papers and marked as Exhibit "A"), suffice it to say here that the People believed that an eighteen month delay (which delay was reasonable to expect since the petitioner was at that time and is currently free on bail) would be harmful to the mental welfare of the seven minor boys who are the victims of the alleged crimes.

On October 15, 1974, the motion came on to be heard in Part III of the County Court of Westchester County. Judge Caruso, Administrative Judge of the County Court, stated on the record that by reason of an order of this Court dated October 9, 1974, Honorable John J. Clyne, County Court Judge of Albany County, had been assigned to hear all matters pertaining to the case of *People* v. *Fielding*. In order to carry out the directive of the Appellate Division, Judge Caruso created a Part VI of the County Court for the specific purpose of the hearing and determination of *People* v. *Fielding*.

At that time, the motion came on to be heard before Judge Clyne. After hearing counsel for both sides, Judge Clyne denied the People's motion for a preference as academic, without prejudice to renewal at a subsequent date; he then stated that the trial of this matter would commence on October 28, 1974. An off the record discussion of a possible plea and sentence then ensued and was completed.

Defendant petitioner now requests a judgment under Article 78 in the nature of mandamus. More specifically, he requests an order of this Court directing Judge Clyne

to disqualify himself from presiding at the trial of the petitioner under indictment no. 74-00026, and a further order of this Court directing the District Attorney of Westchester County and the Judges of the County Court, Westchester County " . . . to handle the trial of said indictment 26/74 in the same manner as any other case and in the normal course without preferences. . . ."

The petitioner argues that Judge Clyne should disqualify himself because of the remarks he allegedly made with respect to sentencing and because he is aware of the reason for his being assigned to hear the matter of *People* v. *Fielding*.

While the People do not concede the appropriateness of Article 78 relief (CPLR 7803) nor the truthfulness of petitioner's allegations nor the sufficiency of those allegations, even if true, for the disqualification of Judge Clyne, they would not oppose an order of this Court assigning a different judge to hear and preside over the trial of indictment no. 74-00026. This is so because the People have no interest in which particular judge presides over the trial of said indictment. Rather, the People's only interest is moving this matter for trial. As was pointed out in our original moving papers, the People believe that because of the nature of the crimes charged, the ages of the victims and the nature of defendant's activities, the interests of justice would best be served by a speedy determination of this matter. To that effect, and in light of the Court's inherent power to control its own trial calendar (compare CPLR 3403), we submit that it was error for Judge Clyne to have denied the People's motion for a preference.

However, as Mr. Lanna has indicated that he will be available on November 18, 1974, or shortly thereafter, the People would not object if this Court should decide to put the trial of this matter over to that time.

The petitioner also argues that granting a preference in this matter will advance it ahead of hundreds of other cases, many of which involve defendants who are in jail.

In this regard, the People would only note that in so far as it appears that a "special" judge is to be assigned to this case, a judge who would not otherwise be available to the County Court of Westchester County, the granting of a preference in this matter would not cause a delay in any other case now pending in the Westchester County Court.

Finally, the People would also note that defense counsel appears to have a conflict of interest; he apparently believes that his obligation to his other clients outweighs this defendant's right to a speedy trial. That is, at no time has counsel argued that Brian Fielding's rights would be prejudiced by the granting of a preference; rather he has argued and continues to argue, that the right of his other clients who have been indicted on earlier indictment (those cases would thus ordinarily precede the case involving Fielding) would be prejudiced. If this be the thrust of counsel's arguments, then it is respectfully submitted that he should consider withdrawing as counsel to all other clients (on earlier indictment) whose cases would ordinarily precede that of Brian Fielding had not a preference been, in effect, granted.

WHEREFORE, your deponent prays that the instant petition insofar as it seeks an order directing the District Attorney to handle this case in the normal fashion and without a preference be denied.

(Sworn to by B. Anthony Morosco, Administrative Assistant District Attorney, October 31, 1974.)

B9

Affidavit of B. Anthony Morosco, in Support of Motion.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF WESTCHESTER } ss.:

B. ANTHONY MOROSCO, being duly sworn, deposes and says that he is an Assistant District Attorney of Westchester County and makes this affidavit in support of a motion by the People to strike from the defendant-appellant's appendix heretofore filed Pages A 836, A 837, and A 838, upon the grounds that the same do not constitute part of the record in this case. This affidavit is made upon information and belief, the source of which is the examination of the District Attorney's files maintained in this matter, the brief and appendix heretofore filed and served by the defendant-appellant, and upon conversations had between the deponent and the Honorable John J. Clyne, County Judge of Albany County, as a result of and on account of receiving the aforesaid appendix containing the aforesaid pages.

Pages A 836, A 837, and A 838 of the defendant-appellant's appendix purport to be the reproduction of an affidavit captioned in this Court by one Ann Vitale, which allegedly reports concerning a conversation between her and the Honorable John J. Clyne, County Judge of Albany County, who was sitting by designation in Westchester County and was the sentencing judge in this case. That affidavit was never submitted to the County Court of Westchester County at any time during the proceedings in that

Court and appears to have been presented for the first time to this Court upon consideration of the appeal. It purports to contain a report of a conversation had between Ann Vitale and the sentencing judge. Judge Clyne has informed your deponent that although such a conversation took place, the affidavit, which your deponent read to him over the telephone, wholly misrepresents and mis-states the tenor of the conversation. Judge Clyne indicated to your deponent that there were numerous ex parte communications between defendant's attorneys and the sentencing judge, not appearing in the record, initiated by the attorneys, during the period of recess between the verdict and the sentence, while Judge Clyne was in Albany. On several occasions, at their request, he spoke to counsel. Counsel urged him to meet with many people who knew the defendant. In general, the Judge declined to do so, but did consent to meet with Ann Vitale. Judge Klein discussed Brian Fielding with her, listened to what she had to say, and expressed his reasons to her for considering the imposition of a prison term, which the Judge indicated to me, at that time he was leaning to but had not ultimately determined.

It is respectfully submitted that the extreme consideration shown by the Judge in acquiescence, in part, at the request of defense counsel to listen to Ann Vitale (such requests being made by defense counsel without knowledge of the District Attorney, although counsel for the Appellant have elsewhere, in what must be mock indignation, condemned ex parte communications) is poorly repaid by the improper filing of an affidavit which distorts the nature of the conversation. In any event, the Judge indicated to me that Ann Vitale understood from him that the conversation would be "off the record." If counsel wish to object to this understanding and to make the conversation a matter of record pertinent to sentence, that should have been done in the trial court. In any event, the affidavit was not there filed while the case was pending and cannot possibly be

part of the record. Indeed the failure to make the actual conversation, as distinguished from the Vitale version thereof part of the record could only prejudice the People, who were not aware of or a party to the conversation. This must be an extreme case of the defendant wanting his cake, and eating it also, for while he maintains upon the record the insistence that the Judge is prejudiced against him, nevertheless, he has sufficient confidence in the open-mindedness of the Judge, to believe that ex parte solicitations of leniency may be effective.

In any event, it is respectfully submitted that the inclusion of this affidavit in the Appellate record of this matter is wholly and totally improper, that it cannot under any rule, provision or principle constitute part of the record, and accordingly, that it should be stricken.

Even if this affidavit were filed in a proper post-conviction proceeding, the People would be entitled to controvert it and to have an evidentiary hearing with respect to its accuracy, which right is clearly frustrated by the improper procedure of merely appending it to the Appellate appendix as if it were part of the record of the proceedings below.

Judge Clyne further advised your deponent that he was wholly unaware of such an affidavit until it was read to him by the deponent over the telephone during their conversation on Monday, July 14, 1975. At no time during the proceedings was such an affidavit submitted to Judge Clyne for any purpose whatsoever or in any way made part of the record of the proceeding in the County Court.

WHEREFORE, it is respectfully requested that the instant motion to strike the aforesaid material from the appellate appendix herein be granted.

(Sworn to by B. Anthony Morosco, Assistant District Attorney, July 17, 1975.)

Transcript of Remand Proceeding Before Honorable
John J. Clyne, Held August 12, 1976

COUNTY COURT : COUNTY OF WESTCHESTER

156a

- X

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Indictment No.
74-00026-01

BRIAN FIELDING,

Defendant.

- X

"Miscellaneous Hearing"

111 Grove Street
White Plains, New York
Part: VI A
Date: August 12, 1976

B E F O R E:

HON. JOHN J. CLYNE,
County Court Judge

A P P E A R A N C E S:

CARL A. VERGARI, ESQ.
District Attorney of Westchester County
Attorney for the People
111 Grove Street
White Plains, New York 10601
BY: ANTHONY MOROSCO, ESQ.
Assistant District Attorney

SAXE, BACON & BOLIN, ESQS.
Attorneys for the Defendant
39 East 68th Street
New York, New York 10021
BY: ROY COHN, ESQ., ofCounsel
AND: MICHAEL ROSEN, ESQ., of Counsel

Carl R. Anderson
County Court Reporter

(Court convened at 2:00 P.M.)

If it please the Court, before we commence the proceeding, I would like to advise the Court that the Defendant had applied to the Second Circuit for a Stay of Execution of Sentence and a Stay of these proceedings, and the matter was apparently reached by the Judge this morning and we received from the Clerk of the Second Circuit an oral decision and the decision was "Order Denying Motion for a Stay of Remand Order denied", that is, the attempt to stay these proceedings denied. "Grant Stay of Execution of Sentence until Tuesday, which is August 17th. There will be oral argument at 10:30 before the Second Circuit."

The way I interpret that, your Honor, is that these proceedings can go forward but the execution of sentence is stayed until a hearing on the application before the Second Circuit Bench on Tuesday.

MR. COHN: That is correct.

THE COURT: Brian Fielding, are you represented by Counsel?

THE DEFENDANT: Yes, your Honor.

THE COURT: Will Counsel state their names on the record?

BEST COPY AVAILABLE

MR. COHN: Thank you, your Honor. The name of Counsel representing Brian Fielding in the State Court proceedings is Saxe, Bacon & Bolin, 39 East 68th Street, New York, New York, by myself, Roy Cohn, and Michael Rosen, one of my partners who is here in Court with me.

Your Honor, the Federal Court action, the one which resulted in Judge Metzner's decision and the proceedings now pending before the United States Court of Appeals Second Circuit, in that action the Paul Weiss, Rifkin firm is representing Mr. Fielding and Mr. Jack Auspitz, of that firm is here in Court today as a courtesy to your Honor in the event your Honor has any questions about the Federal Proceeding with which they have a good deal of familiarity.

I concur, or we concur in Mr. Morosco's advice to your Honor that the terms of the Stay granted by the Court of Appeals are such that your Honor goes ahead with what your Honor wishes this afternoon and the stay of execution or any execution of sentence is stayed by the Court of Appeals, and I guess the next thing is, if your Honor would be gracious enough to outline to us just what procedure this

afternoon your Honor would propose to follow and then we could be heard on that.

Your Honor, I might I say this at the very outset: In talking to Mr. Auspitz, we do want to make one original application which I suppose I should make right now and that is an application to your Honor to adjourn whatever hearing your Honor contemplates, or whatever hearing date your Honor intends to fix here until such time as the United States Court of Appeals has disposed of this. As you know, the Defendant is confined at the hospital and I suppose there is no prejudice at all one way or the other and to prevent -- I'm sorry your Honor had to come down today and Mr. Morosco had to come back, but we do feel that the Paul Weiss firm and our firm could proceed in a more orderly procedure if your Honor would consider adjourning what you are going to do until there has been a determination by the United States Court of Appeals Second Circuit. That would be the first application.

THE COURT: Mr. Morosco?

MR. MOROSCO: Your Honor, in view of the fact that originally we took no position when the Defendant was originally making an application to

the Court for an adjournment, the Defendant applied to the Second Circuit not just to Stay the Execution of Sentence, but to stay these proceedings. The Second Circuit has seen fit to deny this stay. While, of course, our position is and we maintain in the Second Circuit that the District Court erred in any remedy whatsoever, but in this case we believe nothing could be achieved by a delay in these proceedings. We believe that it would be better for the record if the State Court proceedings would be completed at the time the matter reached the Second Circuit.

THE COURT: Very well. The matter is before the Court this date as the result of a decision and order of the Honorable Charles Metzner, United States District Court Judge for the Southern District of New York, which decision and order is dated July 16th, 1975. Judge Metzner remanded the matter to Judge Clyne for further proceeding. The decision reads as follows: "If after an objective evaluation the Judge finds that his sentence was motivated by such improper consideration, he shall set the sentence aside and resentence Petitioner. Should he conclude that he did not penalize Petitioner for his insistence on trial he shall file an appropriate order

to that effect."

The language is right out of Hoss v. United States, reported in 495 Fed. 2d page 936. Consequently, what it would appear to this Court is that the Federal District Court has sent this matter back to this Court to review the possibility that the sentence was, in part, motivated by the Defendant's insistence upon trial and, therefore, could indicate some vindictiveness on the part of the Court for the Defendant having exercised his constitutional right to a trial. I interpret this remand to be akin to an examination of conscience on the part of the sentencing Judge. I am treating it accordingly.

For the record, I wish to point out that I am about to review in my mind the many factors that went into the sentence imposed in this case without the aid of any notes, without any written memorandum in front of me. My recollection is that the Defendant in this case was found guilty after a non-jury trial of seven counts of Sodomy in the 2°, Class D Felonies, and seven class A Misdemeanors. The sentence was deferred. The verdict was rendered in the middle of November, sentence was deferred to the latter part of December, 1974.

In the period of time between the verdict and sentence, this Court was contacted by Mr. John Lomenzo, an attorney and former Secretary of State of the State of New York and former County Judge of my home County. The initial contact was the request for an adjournment of the sentencing, principally. My recollection is the sentencing attorneys required more time to put together a pre-sentence memorandum. That request was granted and sentencing was scheduled for January 2nd, 1975. It seems to me the week before Christmas of 1974 I was visited in my chambers, in Albany, by the attorneys who were preparing the pre-sentence memorandum. I am not certain whether they delivered it to me at that time or not, but, however, there was a lengthy discussion in chambers concerning sentencing in this case. My further recollection is that at that time the attorneys had with them a handwritten note from the Defendant which this Court read and returned to the attorneys with the comment that I was unimpressed.

Thereafter, Mr. Lomenzo again visited me in my chambers and requested that I talk with the parents and I indicated that I would not. We talked some more. I indicated to him that I would speak

with an Ann Vitelli who had written a fairly lengthy letter to the Court on behalf of the Defendant, and a well written letter I might add. Such a conference took place in my chambers. The subjects covered in that conference subsequently appeared in an Affidavit filed in this matter to which I did not reply. My only comment on the contents of that Affidavit is that much of the language was taken out of context. It was a give and take discussion. The woman was upset over the prospect of the Defendant being incarcerated. It was in the nature of a philosophical discussion at some points; at other points she indicated the many good qualities that she saw in the Defendant.

The pre-sentence report in this case was voluminous. It contained some five or six reports from Psychiatrists. There were over a hundred letters submitted to the Court on behalf of the Defendant. This Court read every single letter and every single word in the pre-sentence memorandum, many parts of it on two or three occasions. The pre-sentence report submitted by the Probation Department to this Court was forwarded to me in Albany well before sentence was pronounced in this case.

On December 31st, 1974, in the

forenoon, I received a call from Mr. John Lomenzo requesting that he be given an opportunity to discuss this case with me on New Year's Day. Originally I agreed. Subsequently I declined and suggested that I would be in Westchester several hours prior to sentencing and I would discuss the matter with him at that time, as I did. I also discussed the matter at that time with Mr. Vincent Lanna, trial Counsel for the Defendant. Apparently, the portion of the Affidavit originally filed for disqualification of myself as a Trial Judge in this case set forth, among other things, that when I was first holding Court in this case in October of 1974, after having set a trial date in a conference in the robing room attended by Mr. Lanna, the Assistant District Attorney who tried the case and myself, in an effort, I thought, to be decent, I asked the attorneys if there had been any plea bargaining negotiations. In substance, Mr. Lanna indicated that the District Attorney's Office didn't care to talk to him. I did request the District Attorney himself, to please review the matter and to communicate a possible offer to Defendant's Counsel. At that time I advised both attorneys that I did not believe I would accept a plea below a Felony level and that my

present inclination at that juncture was to incarcerate. I mentioned this for the principle purpose of putting Mr. Lanna on notice. I didn't want to sandbag him. In that discussion, and this is exactly what it was, we explored the possibilities of what would happen in the event of a trial, and I pointed out to Mr. Lanna at that time that things could possibly be worse, bearing in mind that if the Defendant were to plead guilty to a single Felony, sentence would be imposed accordingly. If there were multiple Felony convictions, obviously, that would be a factor in the final sentence imposed. At no time was there any discussion about actual time or the threat of any possible sentence in the event of a trial.

Now, when the matter was finally returned to this Court for trial, Mr. Lanna, much to my surprise advised me that the Defendant desired to waive a jury trial and go to trial before the Court alone. The case being one that a waiver was proper, the same was executed in open Court and the matter proceeded to trial. I must make one comment. It is quite possible that the trial of the action in some respects went to the benefit of the Defendant for the reason that Mr. Lanna's conduct during the course of

that trial was exemplary in my opinion. He conducted himself as a gentleman and as an able, dedicated member of the profession and, consequently, when he came to speak to me concerning sentence he had a high credibility rating. Very honestly, this Court agonized over the sentence to be imposed in this case. If you want to know the truth, it was a mental Gethsemane. I ranged from max max with minimum sentences in my own mind to probation. The Court took into consideration every word that was contained in the pre-sentence report and I might add, also, that not once during the entire period between the verdict and sentence or at any time did the People in any manner indicate to the Court their feelings concerning sentencing in this case.

I read and re-read the pre-sentence memorandum. I read many of the cases cited therein, if not all, and also the Department case where probation was given in a single instant involving that peculiar situation. In imposing this sentence I took into consideration the nature of the crimes involved, the age of the victims, the impact that the sentence would have upon the community and society, generally, and also I considered the fact that this Defendant who

was in a position of authority with these young boys abused that authority, used that authority, and although there was no physical force involved, in the judgment of this Court there could well have been psychological force, however minute or subtle.

When I drove down from Albany on the day of sentencing, alone, the entire trip was devoted to trying to arrive at what I considered to be a proper sentence in this case. In addition to which I talked with Mr. Lomenzo in chambers on behalf of the Defendant and with Mr. Klein. I felt, based upon the nature of the crimes, particularly, that a sentence to the Department of Correction was in order, bearing in mind there were seven counts of Sodomy 2nd, a Class D Felony, the original Indictment contained some 52 counts, many of which merged as a result of the verdict. I firmly believed that under the circumstances of this case a minimum period of imprisonment would not have been out of order. I did not impose a minimum period of imprisonment. I imposed a term of seven years to the Department of Correction with no minimum on the first count and on the second Sodomy 2nd charge I likewise imposed a period of seven years imprisonment without a minimum to run consecutively. I did this with a reason.

I am well aware under our law that after one year a Defendant imprisoned pursuant to an indeterminate sentence of imprisonment is eligible for parole. It could well be that those gentlemen would read the pre-sentence memorandum submitted on behalf of this Defendant differently than I did and they would at that juncture be free to release him from incarceration. I, personally, felt that in view of the background and the nature of the crimes and what was contained in the psychiatric report that it would be best for not only the Defendant, but society in general, that the system, so to speak, have a hold on this Defendant for a period of time. Hence, the consecutive sentences on the first two charges.

It was not my intention at that time to place anymore additional jail time or incarceration per se in the sentence. Had I desired to do that I would have imposed a minimum period of imprisonment.

Now, on balance, in view of all the background, bearing in mind the nature of the charges, the manner in which they were committed, the impact it would have upon the community and taking into consideration rehabilitation of the Defendant, I personally felt that the sentence was appropriate in

the circumstances and tailor made to suit everybody. I have detailed for you and for Appellate review what went through my mind in trying to arrive at a just and proper sentence in this case. At no time was I ever motivated by any vindictiveness toward this Defendant. I did not know the Defendant. I am not a member of this community. I knew none of the principals involved when I came down here. I was as objective as a human being could be in the circumstances, and I fluctuated from one to the other almost until the moment I took the bench and I must honestly say that it may well have been only when I started to pronounce the sentence did I, myself, know what it would be.

Now, I do not know what more a Judge can do. I have set forth for this record my thoughts in this matter. I consider this to be an objective evaluation. Consequently, I find that my sentence was not motivated by any improper considerations whatsoever and, consequently, I am not going to set the sentence aside.

I conclude that I did not penalize the Defendant in this case for his insistence on trial and an appropriate order to that effect shall be entered. This Court stands adjourned.

MR. COHN: Excuse me, your Honor, may we be heard? I would very much appreciate the opportunity.

THE COURT: I am adjourning at this point.

MR. COHN: May I continue then to make a record in your Honor's absence then? I would appreciate it very much. We had some papers to file in connection with what your Honor has just done and we wish to express to his Honor for his consideration our views as to what the Order of Judge Metzner did, in fact, call for on the part of your Honor, not what your Honor has done here today, and we also might ask your Honor to clarify one or two of the points raised by Judge Metzner in his opinion and in his remand to his Honor, and if your Honor leaves us here without letting us do that --

THE COURT: I feel that I followed the dictates of the Decision and Order of Judge Metzner. I will stand on this record and any further applications, I suggest you make them to the Second Circuit.

MR. COHN: I was just going to ask your Honor, if you beg our indulgence, it might be of some benefit to the Court. Your Honor took some position

and we have a slightly different position.

THE COURT: That may be.

MR. COHEN: I want a chance to tell you about it and then if you adhere to what you have done, that is certainly your prerogative. I feel useless being here if I can't tell you this.

THE COURT: Very well.

MR. COHEN: Thank you very kindly, Judge.

Your Honor, as I understand what your Honor has said in his recital of the facts that preceded the imposition of sentence here, your Honor has stated, again tying this in with Judge Metzner's opinion, your Honor stated that he did not in fact tell Mr. Lanna that your Honor would incarcerate the Defendant. You said there was a possibility that you would or you were thinking along those lines, and you did that so as not to mislead Mr. Lanna, but you did not flatly say "Look, he is going to jail if there is a plea." I further understand your Honor to have stated here that your Honor did not say that "If the Defendant went to trial or were found guilty the sentence would be or might be more severe", but that the only discussion along those lines was as your

Honor indicated today that "If we go to trial and certain new facts come before me you are running a risk" and so on and so forth, "And that might influence me"; but there wasn't this flat statement that "If you don't take a plea that this sentence might be more severe", I understand that. What I don't understand, your Honor, is this: When Judge Metzner sent this back for an objective evaluation, Judge Metzner using the objective evaluation language which your Honor specifically rejected the applicability of the procedure in the Hess case, thus pointing out the Hess case involved a pure question of law wherein the sentencing Judge could not and did not apply cases which had occurred subsequent to the imposition of sentence, so he sent it back to your Honor for an objective, not a subjective, evaluation. Now, in making an objective evaluation, we have the conflict between your Honor's recollection and the Defense Counsel's recollection which was, of course, transmitted to the Defendant at the time as to what the consequences to him might be if he went to trial. That is something which is almost an impossibility for you to pass upon.

THE COURT: Let me ask you this: He went to trial. This isn't even a factor anymore.

It didn't chill his right to trial because he had his right to trial, in addition, all right? What I am saying for this record is that in no manner was my sentence in any way predicated upon the fact that this Defendant went to trial. Do you understand that?

MR. COHN: I understand that, your Honor.

THE COURT: Very good.

MR. COHN: Your Honor, may I? Is that what you followed in this case and in no way predicating a Defendant's decision to go trial on the severity — a more severe decision if the Defendant were found guilty? Is that your Honor's standard sentencing practice?

THE COURT: Mr. Cohn, I am well aware that somebody has had a private Investigator running all around Albany trying to get Affidavits from lawyers that I am a very heavy, clear cut Judge when it comes to plea bargaining and the like. First off, I don't know what Affidavits you have. Secondly, I know you don't have them from the people that do most of the work in my Court, that is A) B, what I do in Albany is irrelevant as to what I did in this case because I have just told you exactly what happened

and take my word for it, Mr. Cohn, I gave this sentence as much consideration as a human being could do. I was not unaware of the background and the like of the Defendant. I sympathized with the parents. I sympathized with the Defendant. Believe me I did. I also thought about the victims. I also had to think about the community and I happened to think about the nature of the charges and the manner in which they came about. Now, what more would you want me to do?

MR. COHN: Judge, sticking --

THE COURT: I am a human being. I am not perfect.

MR. COHN: Judge, sticking to Judge Metzner's test, that is the standard here today, I would submit that an objective evaluation in the face of a factual conflict exists and should be decided at an evidentary hearing in which Mr. Lanna testifies. As Judge Metzner pointed out, your Honor had not filed any Affidavit contradicting what Lanna had said. There are no secrets here, Judge. I want to hand this up to you with a copy to the other side.

THE COURT: Mr. Cohn, I well understand that you would like to make me the Defendant in this case. However, I have just stated on the record

what transpired, and let me say this: No matter what the plea bargaining discussions were prior to the trial, in no way did the fact that the Defendant went to trial play any part in the sentence in this case other than the possibility that having viewed the victims as they testified, watching some of the boys break down and cry, obviously I as a human being have to give my thoughts through my sentence, so everything I see and everything I hear has an impression on my mind and certainly that may well have happened, but basically, the reason why the sentence was as I did, as what I stated previously, and in no manner was there any vindictiveness exhibited in this sentence and, very frankly, I happened to have thought that the sentence was extremely fair under the circumstances bearing in mind that I did not impose a minimum and I did it purposely so that the Defendant's rehabilitation could be determined by the experts in the field.

MR. COHN: I thought, your Honor, that the failure to impose a minimum prevents the Defendant from treatment at a less stringent institution which is usually the foremat in cases like this, rather than being of benefit to the Defendant. I am sorry that your Honor seems to feel that there is some

personal indication to make you a Defendant. That is not true at all. I have just been engaged in this a few weeks here. This is just a search for justice and a search for trying to find out what did happen and what should have happened and in no way is this trying to make your Honor a Defendant at all. It is trying to get to the objective evaluation that Judge Metzner asked be made and we are suggesting to your Honor that an objective evaluation rather than a subjective evaluation had to depend on statements and actions as well as a mere statement or not a mere statement, a statement by your Honor as to what your Honor felt influenced him or did not influence him. In other words, to give you an example, if I say "Unless you do this I am going to do that", then I do that, my statement later that I did that but I didn't do it because of such and such doesn't close the matter. If I said something to the contrary to the lawyer in the case before, I think that that is something that has to come out in an evidentary hearing. Now, what has been going on in Albany, it's just been an examination through a qualified licensed private Investigator to try to — I might say, based upon information that had been furnished, trying to determine what your Honor felt

were more proper plea bargaining and sentencing practices and to see whether they were consistent with or flow in the face of Judge Metzner's order. There is no secret, we have given a copy of the Affidavit —

THE COURT: What I did in Albany has no bearing on what I did in Westchester.

MR. COHN: Let me give you this.

THE COURT: I don't want to argue with you. You made your statements for the record.

MR. COHN: May I file a copy of the Affidavit?

THE COURT: Fine.

MR. COHN: Do I understand that your Honor is denying any kind of an evidentary hearing and will not allow any witnesses, Mr. Lanna or anybody else, any of the people referred to in this Affidavit?

THE COURT: Right. I am following Judge Metzner's Decision as I read it.

MR. COHN: One other thing, your Honor. Your Honor seems awfully impatient with me. I have only dealt here for 15 or 20 minutes. I would ask you for a little bit —

THE COURT: The problem is, Mr. Cohn, that as I view the Order and Decision of Judge

Metzner, whatever else takes place at this juncture is surplussage and it is not for my determination, but it is for Appellate review.

MR. COHN: Judge, I understand that. There is one final thing on a totally different issue. I would ask your indulgence because I don't want again to request your presence away from Albany and down here and the necessary inconvenience that is involved. We did have one other thing in mind. Your Honor might give me some guidance on that. We have only been in this a few weeks and we do intend to make a motion and have prepared a motion for a new trial on the grounds of newly discovered evidence and your Honor was very gracious on Mr. Lanna's conduct of the trial, but Mr. Lanna did not conduct the trial. It was just silence and it seems obvious in a trial such as this what this cried out for was a psychiatric defense here and putting it in the record for your Honor's consideration, not just in the pre-sentence report for your Honor's consideration, and then, if necessary, if it came to that, an Appellate consideration whether or not this boy, this young man, had an irresistible impulse disease he could not control, had something which was the subject or could be the subject of treatment and something which

he did which interfered with the exercise of his free will and state of mind and created an irresistible impulse under a doctrine of cases some of which have been filed within the last two years. Certainly, not to have presented that defense to your Honor seems to me and others who have reviewed this case as almost incomprehensible. I can have the Judge feel I am a perfect gentleman if I sit there for a few days and don't do anything to defend my client when there is crying out for presentation to the Court this is a young man with a superior record and background who got into a mess like this because he suffered from something, because he suffered from something that jail isn't going to cure, and it was in his state of mind.

THE COURT: Mr. Cohn, this was not a single isolated incident, that is 1; and, number 2, I do not know the law of this State to be that an irresistible impulse is any defense; mental disease or defect, yes.

MR. COHN: You're right, your Honor. I am talking about irresistible impulse as read into mental disease and defect. That is the way the motion is prepared. I do have a motion that I will —

THE COURT: Make a 440 application.

MR. COHN: Would your Honor consider a hearing after he reads the papers?

THE COURT: Mr. Morosco?

MR. MOROSCO: The People would respectfully request an opportunity to answer such papers, and presume that whether your Honor will consider a hearing would depend whether the requirements of the Statute were met.

THE COURT: Mr. Cohn, I will give you all the time that is necessary on any matter that I have any control over. I do not see where there is anything left to be said as I view --

MR. COHN: The Metzner Order?

THE COURT: Right.

MR. COHN: On the 440 motion, I serve the District Attorney and submitted to your Honor. We do contend that the District Attorney's Office did not supply Rosario material which we found does exist and we specified dates and names and all of that, if your Honor would consider an evidentary hearing on that.

THE COURT: I will read the papers.

MR. MOROSCO: May it please the Court?

THE COURT: Yes.

MR. MOROSCO: I do not know what the Court intends with respect to the Order. I can submit either on notice to Mr. Cohn if he would stay around a few minutes or if we could agree on the language for the Order in a few minutes, for the Court to decide, before it goes back to Albany. I would respectfully request the Court to direct now that the Defendant be remanded, and sentence be executed subject to the stay in the Federal Court. So, as far as the State Court is concerned, we have a direction that the sentence be executed although be it that the stay --

THE COURT: Well --

MR. MOROSCO: I don't want to bring your Honor down here again.

THE COURT: I understand that. However, I do not read the oral directions in that manner. If I am stayed, I am stayed, period, that is it, and not conditioned upon. I would prefer not to do it that way.

MR. MOROSCO: Secondly, your Honor, I would respectfully request that the Stenographer be directed to prepare the minutes forthwith. The

District Attorney will pay the rush price for them, but there is a proceeding on Tuesday in the Second Circuit.

THE COURT: I think that would be prudent.

MR. MOROSCO: Finally, I would like to bring to the Court's attention the fact that the District Attorney is unable to determine that a bail bond in this matter was, in fact, ever filed, although we have or the Court has a Bondsmen's name. At the time —

MR. COHN: I can end that. I don't know, but if it hasn't, whatever was supposed to have been done certainly will be, Judge.

MR. MOROSCO: Could we have a date certain for that?

MR. COHN: By Friday you will have a certification of whatever is required.

THE COURT: By when?

MR. COHN: Friday, your Honor. Today is Wednesday.

THE COURT: By four o'clock this afternoon.

MR. COHN: Sure. I just don't know

physically where to look. I am sure whatever is ordered -- it would be inconceivable that the District Attorney, after a year and a half, wouldn't know whether some conditions weren't complied with. Mr. Vergari's Office is far too competent.

MR. MOROSCO: The County Clerk had been maintaining wholesale bonds filed and pursuant to the Administrative Judge's direction, had transferred them recently resulting in some necessary follow through on each case. I have determined that there is no bail bond. There was a cash bail that was filed and then returned at which time, presumably, a bond was filed, but it was never returned to the District Attorney and the County Clerk advised me today that they do not have it. Part of the Appellate Division was sealed in the County Clerk's Office. I had to wait for them to open the safe to find out if the bond was in there and it was found not to be in there.

MR. COHN: How much was it?

MR. MOROSCO: $15,000.

MR. COHN: I have a feeling there isn't a defect, but if there is we will promptly remedy it. I can assure you of that.

THE COURT: Thank you. Anything furthe

MR. COHN: May this Affidavit be marked as an exhibit?

THE COURT: Yes.

MR. MOROSCO: In view of your Honor's ruling on the credibility portion of the Order, perhaps it would be most convenient if I submitted the Order on Notice and mailed it.

THE COURT: No. I think it would be most prudent if you and Mr. Cohn were to retire to the District Attorney's Office, which is in this building, and have the Stenographer dictate the last portion of my statement which contains this Court's determination, put it in Order form and I will await the Order.

MR. MOROSCO: Thank you.

MR. COHN: Thank you, Judge.

(Court's Exhibit 1 is marked for Identification.)

(Court adjourned at 2:50 P.M.)

C E R T I F I C A T I O N

I do hereby certify that the foregoing is a true and accurate transcription of the proceedings taken by me on August 12, 1976.

Carl R. Anderson

CARL R. ANDERSON

BEST COPY AVAILABLE

COPY OF THE WITHIN PAPER
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ATTORNEY GENERAL

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